Supreme Court, U.S.
FILED

10-922 JAN 18 2011

OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

JOHN M. DIAMOND, Staff Sergeant, U.S. Army,
Petitioner

- versus -

UNITED STATES OF AMERICA,
Respondent

On Petition for *Writ of Certiorari* to the
United States Court of Appeals for the Armed Forces

PETITION FOR *WRIT OF CERTIORARI*

DONALD G. REHKOPF, JR.
Counsel of Record
Brenna, Brenna & Boyce, PLLC
31 East Main Street, Ste 2000
Rochester, New York 14614
(585) 454-2000
drehkopfjr@brennalaw.com

JENNIFER A. PARKER
Captain, Judge Advocate
Defense Appellate Division
U.S. Army Legal Services Agency
901 North Stuart Street
Arlington, Virginia 22203

QUESTION PRESENTED

Are statements to police investigating a crime *per se* nontestimonial for purposes of the Confrontation Clause if made by a person alleged to be a co-conspirator of the accused?

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PETITION

John M. Diamond respectfully petitions for a *writ of certiorari* to the U.S. Court of Appeals for the Armed Forces ["CAAF"] in *United States v. Diamond*, No. 08-0365/AR.

OPINIONS BELOW

The CAAF's grant of review is reported at 67 M.J. 247 (2009)[App. 1a]. The initial opinion of the Army Court of Criminal Appeals ["Army CCA"] is reported at 65 M.J. 876 (2007)[App. 2a]. The Army CCA opinion on remand is unpublished [2010 WL 3529500][App. 50a], as is its Reconsideration / *En banc* denial [App. 59a]. CAAF's denial of further review is unpublished [App. 60a], as was its dismissal of Petitioner's Motion for Reconsideration [App. 61a].

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1259(3). CAAF's denial of further review was on October 19, 2010, and its Dismissal of the Motion for Reconsideration was entered on December 20, 2010.

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

Petitioner was convicted of *inter alia* murder [10 U.S.C. § 918] and conspiracy to commit that murder [10 U.S.C. § 881] by an Army general court-martial. The members [jurors] sentenced him to life without parole and ancillary military punishments. The critical evidence against Petitioner was the testimony of police officers repeating statements made to them by the wife of the victim, beginning some 75 minutes after she called 911 – in the absence of any on-going emergency – and continuing intermittently over the next six weeks.

The trial court[1] and the Army CCA both held that there was no confrontation violation. The CAAF did not address these issues. The Army CCA held that her statements were admissible as declarations of a co-conspirator of the accused – even though they were all knowingly made to police officers investigating the crime, after the alleged object of the conspiracy (murder of the victim) was accomplished.

The Question Presented in this case is therefore whether there is a *per se* rule that statements that would otherwise be *inadmissible* under the Confrontation Clause, may nevertheless be admitted against an accused on the ground that they were made to police by an alleged co-conspirator of the accused.

1. On December 17, 2000, Air Force Captain ["Capt"] Frank "Marty" Theer was shot to death as he

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[1]Petitioner objected on both hearsay and confrontation grounds at his court-martial.

was going up the exterior steps to his wife's office building. His wife, Michelle Theer, Psy.D., was the only known person in the immediate vicinity. Rather than use her (or her husband's) cell phone, she ran to a local business approximately a quarter of a mile away to make the 911 call.[2]

2. The most important witness against Petitioner was Investigator Ralph Clinkscales of the Fayetteville, N.C., Police Department; his testimony covered 230 pages of the trial transcript. Approximately 75 minutes after Dr. Theer's 911 call, Investigator Clinkscales began asking Dr. Theer about what she knew of the events regarding her husband's death. By then the scene had been "cleared" by first responders and there were numerous other officers, evidence technicians, etc., present. Clinkscales conducted his interview which lasted roughly one hour inside of another officer's police cruiser [R.512]. His initial question was, "Can you tell me what happened here?" [R.457].

3. In the ensuing weeks, Clinkscales interviewed Dr. Theer numerous times and his partner, Sergeant William Mitrisin, interviewed her once a couple of days after the homicide. Both testified over repeated confrontation objections at trial regarding the statements Dr. Theer made to them. Dr. Theer invoked her Fifth Amendment rights when called by the prosecution at Petitioner's court-martial and was deemed unavailable by the Military Judge. Petitioner had no opportunity to confront and cross-examine Dr. Theer about any of the statements that

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[2]The 911 call is not at issue herein.

she made to the police.

4. In a subsequent interview of Theer, Clinkscales testified that she told him that sometime after the homicide that she called Petitioner to arrange a meeting with him. Clinkscales further testified that Theer stated her reason was that she wanted to look Petitioner in the eye and that "she would know whether he was telling the truth or not. . . ." [R.584]. She then told Clinkscales that as far as she was concerned, Petitioner "didn't have any involvement" with killing her husband. [R.584]. There was no other proof that this meeting even occurred. The prosecution elicited that statement purportedly to show the existence of an *uncharged* conspiracy to conceal the charged conspiracy by alleging that this statement was false.[3]

5. The basic framework of the prosecution's account at trial was the one provided by Dr. Theer to the police.[4] As to crucial aspects of it summarized in

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[3]However, if as Petitioner claimed, Dr. Theer killed her husband the statement would be true – a credibility function for the fact-finder under basic confrontation principles.

[4]In addition to Dr. Theer's oral statements to the police, during their subsequent investigation they searched her personal laptop pursuant to a warrant and retrieved a Memorandum that contained an alleged narrative of conversations she claimed she had with Petitioner after the homicide and during the police investigation and his specific responses. Dr. Theer and her attorneys moved to quash that document on the basis of the attorney-client privilege; she testified that she prepared it at the request of her attorneys and for their use in representing her [R.54-112]. The Military Judge ruled that she was not on trial and that Petitioner lacked "standing" to challenge it, and thus (continued...)

the *italicized* part of the next paragraph, the prosecution offered no other evidence against Petitioner.

6. According to Dr. Theer's statements to the police, she and Petitioner spent a night in a hotel room in Raleigh, N.C., the weekend before the homicide celebrating her birthday. The evening of the homicide, she and her husband had attended an office Christmas party at a restaurant called the "Fox and Hound." She admitted calling Petitioner from there.

> *While she and her husband were driving home later, they stopped for gas and she told him that she remembered leaving some documents in her office and that they needed to return. They drove to her office building and parked in the rear near the external stairs. She used those stairs to go up to her office while her husband waited in their vehicle. While in her office, she heard what she recognized to be a number of gunshots. She ran outside and saw her husband mortally wounded at the bottom of the stairs.* [R.514-15].

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[4](...continued)
admitted the narrative as a prosecution exhibit [PE 148] as a co-conspirator's statement on the theory that it showed a continuing conspiracy to cover up the murder. Regardless of the correctness of the evidentiary rulings, the prosecution should be estopped from using the narrative as evidence against Petitioner while contending that it could do so on the basis that it was prepared solely for her attorneys and thus not testimonial.

The prosecution's theory was that Dr. Theer had dawdled in her office until her husband left their vehicle, thus exposing himself to gunfire they attributed to Petitioner, who allegedly was waiting in some nearby bushes. The prosecution offered the *italicized* statements for their truth.

7. Dr. Theer's statements thus not only gave the prosecution an account of the murder, but they also gave her an alibi for the actual shooting – an alibi presented by the police at Petitioner's trial. The importance of this alibi is readily apparent. As the wife of the victim, who according to the prosecution had a motive to be rid of him and was in close proximity to him when he was shot, she must have been a prime suspect. Indeed, Petitioner's principal defense was that it was Dr. Theer who shot her husband.

8. No eyewitnesses placed Petitioner at the crime scene; no physical, trace or DNA evidence linked him to the homicide; and other than the vicarious statements Ms. Theer claimed he made, there were no relevant statements or admissions by Petitioner about the homicide or alleged conspiracy.

9. The Military Judge, at the prosecution's request, admitted Dr. Theer's initial statements to Inv. Clinkscales at the scene as spontaneous (excited) utterances under Military Rule of Evidence ["MRE"] 803,[5] even though Inv. Clinkscales testified that Dr. Theer "only told me something when I asked her something." [R. 473]. The judge's ruling held that

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[5]The MRE's are derived from their federal counterparts.

pursuant to MRE 803(b), Theer's car interview statements possessed "an inherent reliability to pass the objection to the Sixth Amendment's confrontation clause . . . ." [R. 487].

10. The conspiracy charge against Petitioner only alleged that he conspired with Dr. Theer on or about December 17, 2000 to murder Capt Theer, and to effect the conspiracy Petitioner was alleged to have shot Capt Theer on that date. The Military Judge admitted all of Dr. Theer's remaining statements to the police *after* the homicide (and alleged conspiracy ended) to include the written narrative, as statements made "in furtherance" of the charged and uncharged conspiracies.

11. The Army CCA affirmed. It rejected Petitioner's vigorous Confrontation Clause arguments by concluding that *all* of Dr. Theer's post-homicide statements to the police were nontestimonial statements of a co-conspirator and thus, did not violate Petitioner's confrontation rights. That court, 65 M.J. at 885, relied upon *Bourjaily v. United States,* 483 U.S. 171 (1987), a pre-*Crawford* decision that applied *Ohio v. Roberts,* 448 U.S. 56 (1980), which was overruled in relevant part by *Crawford v. Washington,* 541 U.S. 36 (2004).

12. The U.S. Court of Appeals for the Armed Forces ["CAAF"] then granted review. As such, this Court has jurisdiction under the plain and clear language of 28 U.S.C. § 1259(3). *Cf. United States v. Denedo,* 129 S.Ct. 2213 (2009). The CAAF summarily remanded, but only to consider a conflict of interest issue involving Petitioner's prior civilian counsel [App 1.a]. Subsequent to the Army CCA's opinion on

remand, the CAAF denied further review.

REASONS FOR GRANTING THE WRIT

The core principle of the Sixth Amendment's Confrontation Clause is that "the accused shall enjoy the right . . . to be confronted with the *witnesses against him* . . . ." [emphasis added]. Dr. Theer was such a witness. In *Crawford* this Court made it clear that: "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." 541 U.S. at 52. Indeed, *Crawford* made a paradigmatic observation applicable here: "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ." *Id.* at 56, n.7.

This case presents the issue of whether statements made to police officers in a non-emergency situation who are investigating a crime – statements that are without more, clearly inadmissible under *Crawford* and *Davis v. Washington*, 547 U.S. 813 (2006) – are admissible where the prosecution alleges that the unavailable declarant is a co-conspirator, without violating the Confrontation Clause.

I. THE LOWER COURTS ARE IN CONFLICT AS TO WHETHER CHARACTERIZING A STATEMENT AS BEING MADE IN FURTHERANCE OF A CONSPIRACY IS ENOUGH TO PRECLUDE A VIOLATION OF THE RIGHT TO CONFRONTATION – THE DECISION BELOW TAKES THE WRONG SIDE IN THAT CONFLICT.

Petitioner clearly did not have an opportunity to be confronted with Dr. Theer. Accordingly, under *Crawford*, if her statements were testimonial in nature, admission of them violated his confrontation rights. There can be no doubt that, were it not for the contention that Dr. Theer and Petitioner were alleged to be co-conspirators, the statements principally at issue here would be deemed testimonial. Her statements to the police were, after all, made absent any ongoing emergency and in response to their interrogation in connection with a homicide investigation.

The question then becomes whether the result changes because the two were allegedly co-conspirators. In *Crawford*, this Court noted that statements such as business records and statements made in furtherance of a conspiracy "by their nature" are not testimonial. 541 U.S. at 56. Many courts took this to mean that any statement that they deemed to fall within the hearsay exception for business records was therefore not testimonial. In *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009), this Court clarified that approach:

> Business and public records are *generally* admissible absent confrontation not

> because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

129 S.Ct. At 2539-40 [emphasis added].

Similarly, the decision below represents a view that, if the statements at issue may be deemed to fall within the hearsay exemption for statements of a co-conspirator of the accused, they are therefore *per se* not testimonial in nature for purposes of the Confrontation Clause. Or, as the Army Court below held:

> Because we find that *Crawford* does not apply to co-conspirator statements we find the admission of these statements did not violate the Sixth Amendment's Confrontation Clause.

65 M.J. at 887. This case is thus an appropriate vehicle to clarify, as *Melendez-Diaz* did, the proper approach to determining whether co-conspirators' statements are also testimonial for confrontation purposes.

In *United States v. Shyne*, 617 F.3d 103, 108 (2nd Cir. 2010)(*per curiam*), the Court stated the general

rule regarding co-conspirators' statements: "statements in furtherance of a conspiracy are non-testimonial for purposes of the Confrontation Clause, and are therefore not covered by its protections."[6] *Accord, e.g., United States v. Singh,* 494 F.3d 653, 658 (8th Cir.), *cert. denied,* 552 U.S. 1006 (2007); *United States v. Crozier,* 268 Fed.Appx. 604, 2008 WL 565368 (9th Cir. 2008). But, the "one size fits all" approach is incorrect, for reasons analogous to those articulated in *Melendez-Diaz.*

Statements made during and in furtherance of a conspiracy are *generally* beyond the scope of the Confrontation Clause, not because they may fit within the scope of an exemption to the hearsay rule, but because they are made to advance the purposes of the conspiracy. Furthermore, they are usually *not* made in anticipation that they will be used in the investigation or prosecution of crime.

But if a statement is knowingly made to police investigating a serious crime, then this general proposition does not hold. Even if the conspiracy is deemed to still be alive – either because avoiding detection is treated as having been a critical part of it, *see United States v. Trent,* 306 Fed.Appx. 483, 486, 2009 WL 22510 (11th Cir. 2009) [attempts to conceal unlawful conduct necessary part of conspiracy], or as the Army court said was true here, *i.e.*, there were life insurance proceeds to be collected and enjoyed – that

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[6] *But see, United States v. Logan,* 419 F.3d 172 (2nd Cir. 2005), where another Second Circuit panel used a fact-specific analysis to correctly conclude that co-conspirators' statements were testimonial.

does not matter for purposes of the Confrontation Clause. Rather, for *that* purpose the critical fact is that the speaker knows she is providing information relevant to a serious crime to the police who are both investigating that crime and gathering evidence for use in a potential prosecution of that crime. That fact plainly renders the statements testimonial.

Indeed, if the statements of the sort at issue here – knowingly made to the police investigating a murder by the sole alleged co-conspirator of the accused *and* tending to absolve her of guilt [here, the alibi] – are admissible without an opportunity for confrontation, then the doctrine countenances a flagrant violation of the confrontation right.

Recognizing this principle under circumstances such as presented here, would not upset settled practice. On the contrary, it is "consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949); *Wong Sun v. United States*, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)." Advisory Committee Note to Fed. R. Evid. 801(d)(2)(E).

II. THE *CORRECT* APPROACH.

A number of courts post-*Crawford*, have grasped the concept that just because a statement may also be a business or public record, or a co-conspirator's statement, that this does not end the constitutional confrontation enquiry. The Confrontation Clause requires additional analysis as *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), held.

For example, in *United States v. Logan*, 419 F.3d 172, 178 (2d Cir. 2005), the court said that, although the false alibi statements in question were made in furtherance of the conspiracy, "they were also testimonial." The court noted that the speakers "made their false alibi statements in the course of a police interrogation, and thus should reasonably have expected that their statements might be used in future judicial proceedings. Given *Crawford*'s explicit instruction that '[s]tatements taken by police officers in the course of interrogations are ... testimonial under even a narrow standard,' *Crawford*, 541 U.S. at 52, the government's contention that these statements were non-testimonial is unconvincing." *Id.* at 179.

Consider also *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010). That case also involved charges that a woman (there, the accused) and a man with whom she was having an affair conspired to murder the woman's husband. After the murder, the other conspirator committed suicide and left a note narrating the crime, attributing substantial culpability to the accused. The Court of Appeals for the Sixth Circuit held the note to be testimonial, in light of the clear probability that it "would be passed on to law enforcement" [*Id.* at 926] – and this conclusion was not undercut by the fact that the maker of the statement was allegedly the accused's co-conspirator.

Other courts have analyzed such co-conspirators' statements under *Crawford* and reached similar, and Constitutionally correct, results. *See e.g., United States v. Sutherland*, 2008 WL 4858322 (D.S.D. Nov. 10, 2008) ("Even if this Court were to find that [a co-defendant's] statements made to law enforcement fall

within the limits of Rule 801(d)(2)(E), the Court still would find them to be inadmissible under *Crawford v. Washington*, since such statements are testimonial and therefore their admission would violate Sutherland's Confrontation Clause rights."); *United States v. Thomas*, 2009 WL 2477493 (D. Virgin Islands 2009) (citing *Krulewitch* in support of conclusion that admission of co-defendant's statements would violate accused's confrontation rights); *People v. Ortiz*, 2010 WL 312492 (Cal.App. 2 Dist., Jan. 28, 2010) (holding that Confrontation Clause was violated by introduction of statements made by co-conspirator to law enforcement agents; rejecting a "rule that in every insurance fraud case, the court must find all statements to law enforcement to be in furtherance of the conspiracy so long as the insurance proceeds have not been paid").

Finally, in the context of the so-called "narrative" discussed above in footnote 4, seized from Dr. Theer's personal computer, the court in *United States v. Jackson*, 625 F.3d 875 (5th Cir. 2010), held that drug ledgers obtained from a co-conspirator introduced at trial via a police officer violated the defendant's confrontation rights as they were "testimonial in nature." *Id.* at 880. Judge Dennis concurred "assigning additional cautionary reasons." *Id.* at 886. After an examination of *Crawford* and its underlying rationale, he concluded:

> [T]he drug ledgers are like Lord Cobham's inculpatory letter, which was read to the jury during the trial of Sir Walter Raleigh [citation omitted] – they recount past facts about a conspiracy

implicating the defendant.

Id. at 888. Quoting *Davis*, he noted that the ledgers were testimonial "because they do precisely *what a witness does* on direct examination. . . ." *Id.* citing *Davis*, 547 U.S. at 830 [emphasis in original].

As this Court observed in *Melendez-Diaz*:

> The text of the [Sixth] Amendment contemplates two classes of witnesses-those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

129 S.Ct. at 2534 [footnote omitted]. That is precisely Petitioner's complaint – Dr. Theer was that "third category" of witness, "helpful to the prosecution, but somehow immune from confrontation."

III. THE ADMISSION OF DR. THEER'S STATEMENTS TO THE POLICE WAS NOT HARMLESS ERROR.

The Army CCA's initial opinion makes references to their claim that Theer's statements to the police about her affair with Petitioner and her call from the restaurant met the harmless error standard. But, even so, it does not address her other statements to include her alibi. But, that court never applied the appropriate analysis in the first place, as it simply concluded:

> [E]ven if Dr. Theer's statements in

> question would otherwise be considered testimonial, the requirements outlined in *Crawford* do not apply to them because co-conspirator statements are, by definition, *nonhearsay*.

65 M.J. at 884. The opinion itself refutes any type of meaningful harmless error analysis:

> Although some of Dr. Theer's statements may have also concerned efforts to cover up the murder, we cannot conclude these statements related *only* to uncharged misconduct. On the contrary, *we find all of the admitted statements were relevant to prove the charged conspiracy* to commit the premeditated murder of Dr. Theer's husband.

Id. at 892 [emphasis added]. Finally, the Army court plainly erred when it concluded:

> [E]ven if the military judge erred in admitting Dr. Theer's statements, these statements were cumulative or not required. Other evidence properly before the court independently established either the same points or separate facts sufficient to prove the required elements of the offenses.

Id. at 893. That conclusion is belied by the Record as the prosecution had no evidence of any conspiracy in the form of wiretaps, captured emails, informants' statements or admissions by one of the co-conspirators – all they had were Dr. Theer's statements to include her alleged alibi. Without Dr. Theer's statements, the

prosecutors in Petitioner's case would have been left with a dead body and only Dr. Theer in the vicinity. As noted above, there was no physical evidence, witnesses or admissions putting Petitioner anywhere near the crime scene at the time of Capt Theer's murder.

Finally, the Army court's harmless error analysis was fundamentally flawed. It looked at the issue through the lens of prejudice in the admission of Dr. Theer's statements. 65 M.J. at 888. It should have, but did not, look at the issue from the perspective of the prejudicial harm Petitioner suffered by not being able to *confront* and *cross-examine* the declarant of those statements in front of the fact-finder as the Sixth Amendment guarantees.

IV. THE ISSUE PRESENTED IS IMPORTANT.

As demonstrated above, the lower courts are in conflict on how to properly resolve non-testifying co-conspirator (or accomplice) statements given during police interrogations under the Confrontation Clause after *Crawford*. This Court respectfully should not allow this conflict to continue.

1. Non-testifying co-conspirators or accomplices present daily confrontation issues in our Nation's courts when their statements may also be testimonial. Judges, trial and appellate, prosecutors and defense counsel need to know as soon as possible the correct analytical approach to what is or is not "testimonial" in the context of such non-testifying, co-conspirator witnesses.

2. The need for clarification here is just as great as it was for the laboratory reports in *Melendez-Diaz* and quite similar to the issue pending before the

Court in *Bullcoming v. New Mexico, cert. granted,* 131 S.Ct. 62 (2010). *Bullcoming* involves the issue of surrogate witnesses (forensic experts), while this case involves surrogate witnesses in the context of police officers or government informants testifying about what a non-testifying witness allegedly told them during their investigation of a past crime. Both involve tension with the Confrontation Clause in the context of refining the limits of what is constitutionally permissible, *viz.,* how to analyze what is or is not testimonial in the context presented here.

3. The issue is particularly acute in cases such as Petitioner's where there is no physical evidence, no eyewitnesses, no trace or DNA evidence and no admissions or confessions. *All* of the evidence surrounding the uncharged concealment conspiracy emanated in some form or fashion from the named co-conspirator, Dr. Theer, which in turn was used to "boot strap" the charged conspiracy. The prejudice to Petitioner and those similarly situated was immense. The nebulous inferences and innuendoes used by the prosecution to claim proof of the two conspiracies through the police testimony also presented her alibi. With that in place via the testimony of the police, without any opportunity for Petitioner to confront and cross-examine her as to her motives, fabrications, misperceptions, etc., the fact-finder was virtually bound to credit her alibi (after all, it was testified to by the police) and thus, inferentially incriminating Petitioner as the actual perpetrator. If the Confrontation Clause is to have any meaning in this context, it is imperative for this Court to say so with clarity.

CONCLUSION

Dr. Theer's many statements to the police investigating her husband's murder can be characterized as *nontestimonial* only by adopting a rule that a co-conspirator's statements to the police remain nontestimonial, even though made with the knowledge and understanding that they are being gathered for criminal investigative or prosecutorial purposes. Such an approach flies in the face of the plain language and constitutional purpose of the Confrontation Clause.

The *writ of certiorari* respectfully should be granted. [4260]

Respectfully submitted,

DONALD G. REHKOPF, JR.
Counsel of Record
Brenna, Brenna & Boyce, PLLC
31 East Main Street, Ste 2000
Rochester, New York 14614
(585) 454-2000
drehkopfjr@brennalaw.com

JENNIFER A. PARKER
Captain, Judge Advocate
Defense Appellate Division
U.S. Army Legal Services Agency
901 North Stuart Street
Arlington, Virginia 22203

January 2011

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

DAILY JOURNAL
No. 09-094
Friday, January 23, 2009

ORDERS GRANTING PETITION FOR REVIEW

No. 08-0365/AR. U.S. v. John M. DIAMOND. CCA 20010761. [See also APPEALS-SUMMARY DISPOSITIONS this date.]

APPEALS - SUMMARY DISPOSITIONS

No. 08-0365/AR. U.S. v. John M. DIAMOND. CCA 20010761. Review granted on the following issue:

> WHETHER THE NAMED CO-CONSPIRATOR, MICHELLE THEER, PAID APPELLANT'S CIVILIAN DEFENSE COUNSEL RETAINER AND, IF SO, WHETHER THIS CONFLICT OF INTEREST WAS DISCLOSED TO THE COURT.

The record of trial is returned to the Judge Advocate General of the Army for remand to the Army Court of Criminal Appeals for further appellate inquiry on the granted issue. Thereafter, Article 67, Uniform Code of Military Justice, 10 U.S.C. § 867 (2000), shall apply.

APPENDIX "B"

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SCHENCK, HOLDEN, and WALBURN
Appellate Military Judges

UNITED STATES, Appellee

v.

Staff Sergeant JOHN M. DIAMOND
United States Army, Appellant

ARMY 20010761
82d Airborne Division and Fort Bragg
Patrick J. Parrish, Military Judge
Lieutenant Colonel W. Renn Gade, Staff Judge Advocate (trial and recommendation)
Lieutenant Colonel Thomas E. Ayers, Staff Judge Advocate (addendum)

For Appellant: Captain Julie Caruso, JA; Donald G. Rehkopf, Jr. Esquire (on brief); Colonel Mark Cremin, JA; Lieutenant Colonel Mark Tellitocci, JA; Captain Charlie A. Kuhfahl, JA; Major Sean S. Park, JA; Captain Jeremy W. Robinson, JA.

For Appellee: Lieutenant Colonel Theresa A. Gallagher, JA; Captain Edward E. Wiggers, JA; Captain Michael C. Friess, JA (on brief); Colonel Steven T. Salata, JA; Lieutenant Colonel Mark L. Johnson, JA; Major Natalie A. Kolb, JA.

21 December 2007

OPINION OF THE COURT

SCHENCK, Senior Judge:

A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of violating a lawful general regulation by wrongfully transporting and storing a privately-owned weapon in his vehicle and committing adultery on divers occasions, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. § 892 and 934 [hereinafter UCMJ]. A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of conspiring to commit premeditated murder, premeditated murder, and obstructing justice, in violation of Articles 81, 118, and 134, UCMJ. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for life without the possibility of parole,[1] forfeiture of all pay and allowances, and reduction to Private E1. This case is before the court for review pursuant to Article 66, UCMJ.

Appellant asserts a number of errors on appeal.

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[1]The military judge awarded appellant 192 days confinement credit against the sentence to confinement. The convening authority's initial action and promulgating order failed to reflect the credit. *See* Rule for Courts-Martial 1107(f)(4)(F); Army Reg. 27-10, Legal Services: Military Justice, para. 5-31a (24 Jun. 1996) (requiring a convening authority to "show in [the] initial action all credits against a sentence to confinement . . . regardless of the source of the credit . . . or for any . . . reason specified by the judge"); *United States v. Delvalle*, 55 M.J. 648, 649 n.1, 656 (Army Ct. Crim. App. 2001); *United States v. Arab*, 55 M.J. 508, 510 n.2, 520 (Army Ct. Crim. App. 2001). Accordingly, to the extent appellant has not already received this credit, appellant will be credited with 192 days of confinement credit.

None have merit, but one warrants discussion — appellant's contention the military judge erred by admitting Doctor (Dr.) Michelle Theer's statements as a co-conspirator pursuant to Military Rule of Evidence [hereinafter Mil. R. Evid.] 801(d)(2)(E).[2] Essentially, appellate defense counsel assert, *inter alia*, appellant was only charged with *conspiracy to commit the premeditated murder* of Air Force Captain (Capt.) Frank M. Theer, and the military judge committed plain error when he admitted statements that were not made "in furtherance" of the charged conspiracy, but rather, to prove the *uncharged* misconduct of *conspiracy to obstruct justice*. Moreover, appellant asserts these statements were admitted in violation of the Confrontation Clause of the Sixth Amendment to the U.S. Constitution.

We hold the military judge did not err and find the admission of the statements did not violate the Confrontation Clause. In doing so, we necessarily address the responsibilities of the military judge when

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[2]We find appellant's corresponding assertion that the military judge also failed to sua sponte "give the appropriately tailored 'uncharged misconduct' instructions" to be without merit. The parties at trial discussed the possibility of an uncharged conspiracy to obstruct justice, but the defense did not request any corresponding "appropriately tailored uncharged misconduct instructions." We find the military judge did not abuse his discretion by failing to sua sponte provide such a limiting instruction. We do not have "'a definite and firm conviction that the [military judge] committed a clear error of judgment in the conclusion [he] reached upon a weighing of the relevant facts.'" *United States v. Dacosta*, 63 M.J. 575, 579 (Army Ct. Crim. App. 2006) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993) (first alteration in original)).

dealing with uncharged misconduct evidence as it relates to evidence offered to prove a conspiracy.

FACTS

An enlisted panel convicted appellant of premeditated murder and conspiracy to commit the premeditated murder of his paramour's husband, Capt. Theer. The panel also convicted appellant of obstructing justice on or about 12 February 2001 by disposing a Smith and Wesson 9mm pistol. Appellant pleaded guilty to adultery for numerous acts of sexual intercourse with Dr. Theer from February 2000 to February 2001.[3] With appellant's authorization, the panel was informed of appellant's guilty plea to the adultery and Article 92, UCMJ, violations. The members also were given a document (flyer) listing these offenses.

The Murder

Doctor Theer, a practicing psychologist, found her husband's body on Sunday night, 17 December 2000, at the base of the stairwell outside the office building where she worked in Fayetteville, North Carolina. Earlier in the evening, Dr. and Capt. Theer attended her office holiday dinner party at The Fox and The Hound restaurant in Fayetteville. Doctor Harbin, Dr. Theer's colleague, had invited Capt. Theer after Dr. Theer told Dr. Harbin that her husband was upset about not being invited to the dinner party. Prior

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[3]At trial, the defense also conceded that appellant and Dr. Theer continued to see each other after Capt. Theer's murder.

to dinner, Capt. and Dr. Theer left their vehicle in the office parking lot and rode with another of Dr. Theer's colleagues, Ms. HM and Ms. HM's boyfriend to the restaurant. After dinner, Ms. HM, her boyfriend, and the Theers returned to the office parking lot at approximately 2230. The Theers drove to a nearby gas station but then returned to the office because Dr. Theer said she wanted to retrieve some work. While Dr. Theer went up the exterior stairs to her office on the second floor, Capt. Theer waited in the parking lot. From inside the office, Dr. Theer heard shots and ran to see her husband, dead at the bottom of the exterior stairs leading to her office.[4]

Rather than call for help from her cell phone, Dr. Theer ran to a nearby video rental store and told the clerk to call 911 because her husband had been shot. After phoning 911 from the video store, Dr. Theer and another store patron returned to Capt. Theer. Captain Theer was shot four times with a 9mm pistol from more than two feet away, one bullet went through the back of his left upper leg and left forearm. The other two bullets lodged in his abdomen. He was also shot once in the head at a range of four to six inches. A bullet hole was found in the door frame above the office door at the top of the stairs and some sequins from Capt. Theer's holiday suspenders were also found at the top of the stairs.

The Relationship Between Appellant and Dr. Theer

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[4]At trial one witness testified he heard four or five "deliberate" shots fired.

Appellant and his wife, Mrs. Lourdes Diamond, met in Panama and married in 1996. In 2000 they experienced some marital difficulties resulting in appellant leaving her in February 2000 to live with "a friend." He moved back in with his wife sometime between September and October 2000, only to leave her again in January 2001.

In March 2000, appellant met Dr. Theer on the internet when he answered her personal internet advertisement. Appellant and Dr. Theer engaged in an extramarital affair from March 2000 until February 2001. In the fall of 2000, appellant informed his psychology classmates that his fiancée was a psychologist. Later a friend met Dr. Theer at appellant's apartment. Additionally, appellant listed his "girlfriend" as his emergency contact on the unit alert rosters in September 2000. The phone number listed for the unnamed "girlfriend" was Dr. Theer's cell phone number.

Moreover, in September 2000, Dr. Theer applied for a faculty position scheduled to be filled in June 2001 at the Saba University Medical School, located on Saba Island in the Caribbean. In the letter accompanying her application, Dr. Theer indicated she was twenty-nine years old, single, with no children, and would be traveling with her fiancé, "John." Appellant and Dr. Theer traveled to Saba Island on 18 October 2000, two months before the murder. While there, they had dinner with the Saba Medical University administrator who testified Dr. Theer introduced appellant as her fiancé and that after he told the couple about his prior position as a prosecutor

in California for fourteen years, appellant became noticeably quiet. Prior to the trip to Saba Island, appellant sent email messages to the owner of a scuba diving shop indicating he was a dive master moving to the island with his wife and was interested in possible employment. While on the island, appellant left the dive shop owner a note stating: "This is John Diamond, I emailed about the possibility of working here. I am a current dive master. . . . It looks like me, and my wife will be relocating here in Feb[ruary 2001] for approx[imately] 3 y[ears]. Email me later."

During the murder investigation, Dr. Harbin told police Dr. Theer had confided to him in November 2000 that she was having an affair with "someone named John" starting in early October 2000 and ending in mid-November 2000. Doctor Theer told Dr. Harbin she was having marital problems due to a disagreement regarding whether to have children and her belief her husband was having an extramarital affair. Doctor Theer moved out of her home and into an apartment sometime between the summer and fall of 2000. She told Dr. Harbin she was undecided whether to get a divorce because she wanted her husband's signing bonus for extending his active duty service obligation. She moved back in with her husband during the fall of 2000. Doctor Theer was the beneficiary of her husband's $500,000.00 life insurance policy. The Theers applied for the policy on 15 September 1999. The company never paid the claim on the policy following the murder, however, because the company could not complete its investigation.

Appellant and Dr. Theer continued their

relationship after the murder. Doctor Theer told police she saw appellant on 20 December 2000 because she "wanted to look in his eyes and asked [sic] him did he have any involvement in the death of her husband and she would know by looking at him, so she called him." When she asked appellant he said, "no" and "he showed remorse for her and her situation and said that he didn't have any involvement." Doctor Theer also told police she did not think appellant was involved. Their relationship continued even after appellant was in pretrial confinement on 21 February 2001. During the last week of February 2001, appellant placed over 300 calls to Dr. Theer and listed her as the "family shrink" on his visitor request list at the confinement facility in March
2001.

The Murder Investigation

Doctor Harbin testified Dr. Theer told him she called appellant from The Fox and The Hound prior to leaving the restaurant on the night of the murder. During the murder investigation, Dr. Theer gave him the impression she thought the investigators were incompetent and were spending too much time investigating her and appellant. Doctor Harbin reminded her that her telephone call to appellant from the restaurant did make her "look bad" and encouraged Dr. Theer to be less antagonistic and cooperate with investigators.

When interviewed on 19 December 2000 regarding the murder, appellant told Fayetteville Police Investigator Clinkscales he spent one night of

the weekend prior to the murder with Dr. Theer to celebrate her birthday; he admitted they had sexual intercourse. Appellant also told police he saw Dr. Theer the evening before the murder at a restaurant, but claimed he was at home with his wife watching television on the night of the murder. Appellant said he did not own a weapon, but he also said that after ten years of military experience he was a trained sniper and could produce a "close shot group." In the afternoon on the day of the murder, appellant twice called a pawn shop in Fayetteville to determine its store hours for the next day and to obtain information whether he could rent and test fire a handgun at the store. The
morning after the murder, appellant went to the pawn shop and fired a Beretta 9mm pistol, a weapon similar to the weapon used to kill Capt. Theer. As a result, Investigator Clinkscales determined that testing appellant for gun shot residue (GSR) would not provide any useful evidence regarding Capt. Theer's murder. Appellant asked Investigator Clinkscales not to tell his wife about his relationship with Dr. Theer.

Mrs. Diamond testified that the night of the murder appellant arrived at home sometime between 1900 and 2000 and they began watching a rented movie after 2000. Upon receiving a call on his cell phone in the middle of the movie, appellant left the room, changed his clothes, and told her he was going to the base. Mrs. Diamond and her mother continued to watch the "long" movie before Mrs. Diamond went to bed "real late." Appellant had not returned. Appellant's mother-in-law, who had moved in with the Diamonds in November 2000, testified similarly, but said she

woke up when appellant returned during the night. She heard the door and the sound of appellant walking from the door to the kitchen. She also heard "the clothes washer come on later[.]" When Mrs. Diamond awoke the next morning, appellant was asleep in the baby's room. Appellant told her he had gone to the barracks the previous night and did not remember what time he had returned. He ate breakfast with his wife and then left.

Fayetteville Police called Mrs. Diamond on Tuesday, 19 December 2000, and scheduled an interview. Prior to the interview, appellant told Mrs. Diamond to "remember that we were watching movies" and "that night we had had sexual relations." She told appellant that was not true; they did not have sex and he had left after receiving a phone call. Appellant insisted she remember they rented movies and told her to call him after the interview. Fayetteville police interviewed Mrs. Diamond four times, the last interview with agents from the Army Criminal Investigation Command (CID). Mrs. Diamond told them appellant was in her house, watched movies all night, and never left. She told her mother to tell the police the same story. Afraid Mrs. Diamond would lose custody of her baby and they might be deported, however, Mrs. Diamond and her mother subsequently told the police the truth in February 2001, when they discovered the police were investigating a murder.

Disposal of the 9mm Smith and Wesson Pistol

Just prior to the murder, appellant borrowed a 9mm Smith and Wesson pistol from Staff Sergeant

(SSG) Peyton Donald. Staff Sergeant Donald and appellant were stationed together in Panama until appellant went to work for the CID. Appellant told SSG Donald he wanted to fire the weapon on the range. After the murder, and two days prior to returning the weapon, appellant called SSG Donald and asked him if he had received the Fayetteville newspaper. Since SSG Donald did not have the newspaper, appellant told him to search for "Theer" on the internet. This search resulted in an article regarding Capt. Theer's murder. Appellant explained that the victim was Dr. Theer's husband. Staff Sergeant Donald knew Dr. Theer because he and his wife had previously gone out to dinner with Dr. Theer and appellant during the summer of 2000. At the end of January or beginning of February 2001, appellant asked SSG Donald to sell him the 9mm pistol. Unable to buy the weapon from SSG Donald, appellant borrowed it again.

The CID contacted SSG Donald in February 2001, asked him about the 9mm pistol, and requested he call appellant about the weapon since appellant still had it in his possession. Staff Sergeant Donald called appellant on 12 February 2001. Initially, appellant said he no longer had the pistol and did not know where the weapon was. Appellant then called SSG Donald back and offered to retrieve the pistol. Later that night, appellant called SSG Donald again and told SSG Donald someone had broken into his vehicle. Appellant subsequently called SSG Donald to obtain information about the pistol so he could report it stolen along with the damage to his car to the military police.

At 2225 on 12 February 2001, appellant provided military police a sworn statement claiming on 8 February 2001 he parked his car in the very last spot of an on-post parking lot. He further stated his car was parked near the woods in a poorly
lit area at the farthest point from any buildings. According to appellant, when he returned from a weekend trip on 12 February 2001, he found someone had broken into the car and stolen SSG Donald's weapon. Although the Diamonds' divorce was final on 24 January 2001, appellant nevertheless also called his former wife on 12 February 2001 to use her new address for the military police report.

After military police questioned appellant about the theft, they advised appellant he was suspected of murder and he waived his rights. Appellant told the CID agents he had a purely nonsexual friendship with Dr. Theer. After the interview, appellant called Dr. Theer to pick him up at the barracks. Appellant was not at unit physical training the following morning, 13 February 2001, and did not report for duty until 1300.[5] He told the battalion command sergeant major that he had been at the CID office.

Contrary to appellant's version of events, the government presented a surveillance video recorded on 12 February 2001 showing appellant and Dr. Theer

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[5]In allowing this testimony over defense objection based on uncharged misconduct, the military judge conducted the appropriate balancing test before admitting the evidence. *See United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989) (establishing a three-prong test to determine whether uncharged misconduct may be admitted under Mil. R. Evid. 404(b)).

with appellant's vehicle. Additionally, witnesses saw a vehicle resembling appellant's vehicle parked near Dr. Theer's house during this time period. Moreover, Dr. Theer's classmate from graduate school also testified that Dr. Theer and appellant drove to Florida and visited her from 8 until 12 February 2001. According to the classmate, they did not drive any of Dr. Theer's vehicles. During this trip Dr. Theer also dropped off appellant to visit his younger sister. Appellant's brother in-law later took appellant to meet someone fitting Dr. Theer's description driving a vehicle similar to appellant's.

Trial

At trial, Dr. Theer, as an alleged co-conspirator, invoked her Fifth Amendment right to remain silent. Appellant's defense counsel had the opportunity to cross-examine Dr. Theer to the extent she responded to questions. In discussing her unavailability as a witness, the following colloquy transpired:

> CDC: Clearly [Dr. Theer] has invoked, clearly she would not be available . . . .
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> MJ: I'm not ruling on whether or not any evidence is admissible under 804, but I'm just ruling on whether or not she's available and that she has invoked.
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> CDC: I think to, after this display in the courtroom to argue otherwise would be intellectually dishonest and I would not do that, Your Honor.

> MJ: I find that [Dr.] Theer, based on her invocation is unavailable with regards to the subject areas that she invoked in. That's not to say that she is unavailable for anything that might come up but she is unavailable for the subject matters to which she has been asked questions and invoked. Now, whether or not that then makes any other statements admissible under 804 is for a different day to decide based on additional evidence the government may have. . . .

Accordingly, the military judge found Dr. Theer "unavailable" for purposes of Mil. R. Evid. 804.

The government then moved to admit several statements Dr. Theer made before and after Capt. Theer's murder to police officers Investigator Clinkscales and Sergeant Mitrisin as well as to her colleague, Dr. Harbin, and appellant's friend, SSG Donald. The government also sought to admit a ten-page memorandum dated 27 January 2001 retrieved from Dr. Theer's personal laptop computer.

Statements to Police Officers

On 18 December 2000, Dr. Theer admitted her extramarital affair with appellant in a statement to police. She claimed she ended the affair in the fall of 2000, when her husband returned from a temporary duty assignment. On 21 December 2000, Dr. Theer further claimed she had no contact with appellant the day before the murder. This contradicted appellant's admission to the police that he went to a restaurant

with Dr. Theer on 16 December 2000. Doctor Theer eventually admitted to the 16 December meeting with appellant and that she talked to appellant at 1600 the day of the murder. After the police told Dr. Theer they could retrieve her cell phone records, she further admitted to calling appellant from the restaurant restroom prior to departing, but asserted appellant did not answer the call. The other members of the dinner party also testified Dr. Theer went to the restroom immediately before they departed the restaurant.

In January 2001, Dr. Theer asked Investigator Clinkscales if appellant "had an alibi" and if the police had conducted "a GSR test on him." The military judge found these questions "not assertions, [and] therefore not hearsay under [Mil. R. Evid.] 801 and . . . these questions tend to show – [go] to the element of intent on part of the coconspirator in this case . . . . The statements are not admitted as a statement of a coconspirator, that's not the theory upon which they are admitted. They are admitted to show the intent to prove a conspiracy because the accused is charged with a conspiracy."

Statements to Dr. Harbin

Doctor Theer told her colleague, Dr. Harbin, that she called appellant on her cell phone from the restaurant restroom on the night of the murder. She said she was having her car fixed and was calling to arrange a ride. The military judge advised the government this statement "would show complicity – [a] statement by her in furtherance of a way to hide their involvement in that murder. So, if you lay a

sufficient foundation to show that the conspiracy exists, well then Dr. Harbin's testimony can come in front of the members."

Statements to SSG Donald

Shortly after appellant's report of SSG Donald's stolen pistol on 12 February 2001, Dr. Theer called and left a message on SSG Donald's answering machine. She said she was John's friend, wanted to talk to SSG Donald, and wanted to give SSG Donald something because appellant "wasn't able to do it." Staff Sergeant Donald subsequently set up a meeting with Dr. Theer, but he said she did not show up as "she didn't feel comfortable" because the police had asked her to wear a wire
and she felt they may have asked SSG Donald to wear a wire as well.

The Memorandum

Appellate defense counsel contend the military judge erred in entering a document (Prosecution Exhibit (PE) 148) as a co-conspirator statement, which a computer forensics specialist retrieved from Dr. Theer's laptop computer. Doctor Theer testified during a pretrial hearing regarding the defense's motion to quash a subpoena to produce the document. She said she prepared it to give to her attorney after her 27 January 2001 meeting with appellant. According to Dr. Theer, the document is a summary of an interview between Dr. Theer and appellant reflecting her questions and his responses. During this pretrial hearing, defense counsel cross-examined Dr. Theer.

With defense counsel's concurrence, portions of Dr. Theer's testimony from the pretrial hearing transcript were read to the panel during trial on the merits. The military judge told the panel, with defense counsel's concurrence, "[t]his is the testimony at another hearing that I held for Dr. Theer. You're just going to hear some testimony to lay a foundation for those documents just to put them in context." After the reading of the testimony, the military judge also told the panel, "members, you'll be getting a copy of [PE] 148 and that last . . . testimony of Michelle Theer in a prior hearing and putting it in context with [PE] 148." The military judge further explained outside the panel's presence:

> Now, with regards to [PE] 148 that has already been admitted based on the theory of -- or, conversations or statements between two co-conspirators. I've already ruled that the conspiracies existed. It was done in furtherance of a conspiracy. Also, in the question and answer form, questions by [Dr.] Theer and answers by the accused and making a statement by the accused as told by [Dr.] Theer and defense did have an opportunity to cross-examine [Dr.] Theer when she testified regarding this statement.

DISCUSSION

Appellant now contends (1) the admission of these statements violated his right to confrontation

under the Sixth Amendment and (2) the military judge erred in admitting these various statements by Dr. Theer as those of a co-conspirator under Mil. R. Evid. 801(d)(2)(E). Because neither nontestimonial statements nor coconspirator statements fall under the requirements articulated in *Crawford v. Washington*, 541 U.S. 36 (2004), we disagree with appellant's Sixth Amendment claims.[6] Moreover, we find the military judge did not err in admitting these statements under Mil. R. Evid. 801(d)(2)(E).

CONFRONTATION CLAUSE

Law

"Although the right of confrontation and the hearsay rule stem from the same roots, they are not coextensive, and evidence admissible under a hearsay exception may still be inadmissible under the [Sixth Amendment] Confrontation Clause." *United States v. Palacios*, 32 M.J. 1047, 1051 n.5 (A.C.M.R. 1991), *rev'd*, 37 M.J. 366, 367–68 (C.M.A. 1993) (upholding lower court's finding that admission of child victim's videotaped statement was erroneous, but finding admission not harmless beyond a reasonable doubt). *See also California v. Green*, 399 U.S. 149, 155–56 (1970) (recognizing the overlap between hearsay rules

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[6]We also disagree with the government's assertion that because Dr. Theer's testimony was primarily exculpatory the Sixth Amendment Confrontation Clause is inapplicable. We find no support for this proposition. In any event, as the government offered these statements ostensibly to prove a conspiracy existed or some other fact relevant to the government's case, they seem inherently inculpatory.

and Confrontation Clause is not complete, and stating "we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception").

Military Rules of Evidence prohibit admission of hearsay "except as provided by these rules or by any Act of Congress applicable in trials by court-martial." Mil. R. Evid. 802. Hearsay is further defined as an out-of-court statement offered into evidence to prove the truth of the matter asserted in the statement. Mil. R. Evid. 801(c). The Sixth Amendment's Confrontation Clause, however, bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53–54, 68.

In *Crawford*, the U.S. Supreme Court explained that the U.S. Constitution's Sixth Amendment Confrontation Clause "applies to 'witnesses' against the accused — in other words, those who 'bear testimony.'" *Crawford*, 541 U.S. at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Moreover, as the Court noted "testimony" is "typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* The Confrontation Clause pertains to both a witness' in-court testimony as well as out-of-court statements of a testimonial nature. *Id.* However, the Confrontation Clause is not implicated by all out-of-court statements, since "[a]n accuser who makes a formal statement to government officers bears

testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.*

A. Crawford's Application to Non-Testimonial Statements

Following *Crawford*, the Supreme Court emphasized that the Confrontation Clause requirements articulated in *Crawford* apply only to testimonial hearsay. *Davis v. Washington*, 547 U.S. 813, ; 126 S. Ct. 2266, 2274 (2006). As the *Davis* Court explained:

> A critical portion of this holding, and the portion central to resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. *See* [*Crawford*, 541 U.S. at 51]. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Id. at , 126 S. Ct. at 2273.

The initial question, then, is: whether Dr. Theer's statements are *testimonial*. The answer to this question "depends on the meaning of 'testimonial,' [as well as] on the circumstances and context in which out-of-court statements are generated, and whether the

out-of-court statements were made under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial by the government." *United States v. Magyari*, 63 M.J. 123, 126 (C.A.A.F. 2006) (citing *Crawford*, 541 U.S. at 52). In determining whether Dr. Theer's statements are testimonial or nontestimonial, we must consider such factors as whether each statement: (1) was "in response to a law enforcement or prosecutorial inquiry"; (2) involved "more than a routine and objective cataloging of unambiguous factual matters"; and (3) was made primarily to produce "evidence with an eye toward trial[.]" *United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007). As our court further explained:

> The last of the *Rankin* Court's factors requires military courts to conduct a "contextual analysis" to determine "whether the primary purpose of the document [or statement] was prosecutorial in nature." [*United States v.*] *Foerster*, 65 M.J. [120,] 124. "[O]ur goal is an objective look at the totality of the circumstances surrounding the statement to determine if the statement was made or elicited to preserve past facts for a criminal trial." [*United States v.*] *Gardinier*, 65 M.J. 60, 65 (C.A.A.F. 2007). *United States v. Williamson*, 65 M.J. 706, 716-17 (Army Ct. Crim. App. 2007) (second, third, and fifth alterations added).

Analysis

Doctor Theer's statements to Dr. Harbin and SSG Donald do not meet two of these three criteria. Although they may have involved more than a routine gathering of facts, they were not made to law enforcement and it is apparent Dr. Theer did not intend they be used for prosecutorial purposes. *See United States v. Scheurer*, 62 M.J. 100 (C.A.A.F. 2005) (secretly recorded statements to a co-worker are not testimonial). The memorandum retrieved from Dr. Theer's laptop computer contained a summary of conversations between her and appellant made at the behest of her attorneys for her own potential defense in this matter. Her primary purpose was not prosecutorial in nature as she never meant for this document to fall into the hands of law enforcement personnel.

Moreover, in context, it is apparent that in posing the questions Dr. Theer sought to help eliminate appellant as a suspect. Her primary purpose, therefore, was not prosecutorial in nature, but rather to obviate appellant's prosecution entirely. As for Dr Theer's statements to law enforcement regarding her affair with appellant and her call to him from the restaurant, we need not decide whether these constitute testimonial hearsay.[7] Even if we assume error, we find their admission was cumulative with admissions from appellant and testimony from other

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[7]We also agree with the military judge that Dr. Theer's questions to law enforcement were not assertions and do not qualify as hearsay under Mil. R. Evid. 801.

witnesses and, therefore, harmless beyond a reasonable doubt. *See United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006) (assertions of error can be disposed of by assuming the error and determining the error harmless beyond a reasonable doubt). *See also United States v. Othuru*, MJ , 2007 CAAF LEXIS 1657 (C.A.A.F. 12 Dec. 2007) (holding Confrontation Clause violations are reviewed to determine whether they were harmless beyond a reasonable doubt.) In addition, even if Dr. Theer's statements in question would otherwise be considered testimonial, the requirements outlined in *Crawford* do not apply to them because co-conspirator statements are, by definition, *nonhearsay*.

B. Crawford's Application to Co-Conspirator Statements

In *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), the Supreme Court held: "[H]earsay is admissible when the witness is unavailable and the hearsay either 'falls within a firmly rooted hearsay exception,' *see, e.g.*, *White v. Illinois*, 502 U.S. 346, 355 (1992), or has 'particularized guarantees of trustworthiness,' *see, e.g.*, *Idaho v. Wright*, 497 U.S. 805, 820 (1990)." *United States v. Bridges*, 55 M.J. 60, 62–63 (C.A.A.F. 2001). The *Crawford* Court overruled the *Roberts* holding, "that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability — *i.e.*, falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" *Crawford*, 541 U.S. at 42, 60 (quoting *Roberts*, 541 U.S. at 66).

However, prior to its *Crawford* decision, the Supreme Court held that coconspirator statements made in furtherance of the conspiracy do not require the *Roberts*' showing of unavailability or an independent inquiry into the reliability of co-conspirator statements. *See Bourjaily v. United States*, 483 U.S. 171, 183-84 (1987); *United States v. Inadi*, 475 U.S. 387, 398-401 (1986); *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970) (holding that state statute permitting out-of-court coconspirator statements made during the concealment phase of a conspiracy did not violate the Confrontation Clause). The Court in *Bourjaily* held, "the *Confrontation Clause* does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)." *Bourjaily*, 483 U.S. at 183-84.

In *Inadi*, the Court "continue[d] to affirm the validity of the use of coconspirator statements, and . . . decline[d] to require a showing of the declarant's unavailability as a prerequisite to their admission." *Inadi*, 475 U.S. at 402. In reviewing both the Federal Rule of Evidence and the Sixth Amendment, the Court explained:

> There are good reasons why the unavailability rule, developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements. Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition involved in this case, former testimony

often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence. *See* GRAHAM, THE RIGHT OF CONFRONTATION AND THE HEARSAY RULE: SIR WALTER RALEIGH LOSES ANOTHER ONE, 8 CRIM. L. BULL. 99, 143 (1972). But if the declarant is unavailable, no "better" version of the evidence exists, the former testimony may be admitted as a substitute for live testimony on the same point. Those same principles do not apply to co-conspirator statements. Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. . . . [T]he statement often will derive its significance from the circumstances in which it was made. . . . Even when the

declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

In addition, the relative positions of the parties will have changed substantially between the time of the statements and the trial. The declarant and the defendant will have changed from partners in an illegal conspiracy to suspects or defendants in a criminal trial, each with information potentially damaging to the other. The declarant himself may be facing indictment or trial, in which case he has little incentive to aid the prosecution, and yet will be equally wary of coming to the aid of his former partners in crime. In that situation, it is extremely unlikely that in court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force.

These points distinguish co-conspirators' statements from the statements involved in *Roberts* and our other prior testimony cases. Those cases rested in part on the strong similarities between the prior judicial proceedings and the trial. No such strong similarities exist between coconspirator statements and live testimony at trial. To the contrary, co-

> conspirator statements derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence. Under these circumstances, "only clear folly would dictate an across-the-board policy of doing without" such statements. Advisory Committee's Introductory Note on the Hearsay Problem, quoted in Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185, 1193, n. 35 (1979). The admission of coconspirators' declarations into evidence thus actually furthers the "Confrontation Clause's very mission" which is to "advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985), [(quoting *Dutton*, 400 U.S. at 89)].

Id. at 394-96.

The *Crawford* Court did not specifically overrule its decisions in *Bourjaily*, *Inadi*, and *Dutton*. Consequently, those decisions are still binding on this court. As the Supreme Court said in addressing the continued validity of precedents:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct

> application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Following this principle, our superior court concluded that *Crawford* did not by implication overrule *Maryland v. Craig*, 497 U.S. 836 (2004). *United States v. Pack*, __ MJ __, 2007 CAAF LEXIS 1656 (C.A.A.F. 12 Dec. 2007). Likewise, we find no implication the Supreme Court intended to overrule its decisions in *Bourjaily*, *Inadi*, and *Dutton*. To the contrary, after the Supreme Court "overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements," the Court continued citing the *Bourjaily* and *Dutton* decisions with approval. *Davis*, 547 U.S. at __, 126 S. Ct. at 2275.

Consequently, some federal circuit courts addressing this issue post *Crawford* have concluded that co-conspirator statements admitted pursuant to Federal Rule of Evidence 801(d)(2)(E), a rule which mirrors our corresponding Mil. R. Evid., are "generally [nontestimonial] and, therefore, do not violate the Confrontation Clause as interpreted by the Supreme Court." *United States v. Singh*, 494 F.3d 653, 658 (8th Cir. 2007). As the Tenth Circuit aptly reasoned:

> Although the Supreme Court declined to

> precisely define "testimonial," the Court explicitly noted that, historically, "statements in furtherance of a conspiracy" present an "example" of "statements that by their nature [a]re not testimonial." Moreover, the Court in *Crawford* cited *Bourjaily* with approval as one of several recent cases that "hew closely to the traditional line." . . . Because *Crawford* did not overturn *Bourjaily*, the latter continues to control our application of the Confrontation Clause to Rule 801 co-conspirator statements.

United States v. Ramirez, 479 F.3d 1229, 1249 (10th Cir. 2007) (internal citations and footnote omitted).

Similarly, the Seventh Circuit succinctly stated, "[a]s to the *Confrontation Clause* argument, *Crawford* does not apply. The recordings featured the statements of co-conspirators. These statements, by definition, are not hearsay. *Crawford* did not change the rules as to the admissibility of co-conspirator statements." *United States v. Jenkins*, 419 F.3d 614, 618 (7th Cir. 2005), *remanded on other grounds*, 2005 U.S. App. LEXIS 21558 (7th Cir. Ill. Sept. 30, 2005), *cert. denied Coleman v. United States*, 546 U.S. 1051 (2005).

Analysis

The Military Rules of Evidence, like the Federal Rules of Evidence, also place co-conspirators' statements in the category of nonhearsay. Mil. R. Evid.

801(d)(2)(E) (stating "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay). As with the corresponding Federal Rule of Evidence, the majority of co-conspirator statements admitted pursuant to Mil. R. Evid. 801(d)(2)(E) are inherently nontestimonial because the primary purpose for making the statement is not for later use in trial. *See United States v. Mooneyham*, 473 F.3d 280, 286 (6th Cir. 2007) (applying *Crawford* to coconspirator statements). Similarly in appellant's case, the military judge admitted the statements of Dr. Theer at issue as "non-hearsay" co-conspirator statements or as other "non-hearsay." Because we find that *Crawford* does not apply to co-conspirator statements we find the admission of these statements did not violate the Sixth Amendment's Confrontation Clause.

Although our superior court has not addressed the specific question before us, its decision in *Pack* supports our interpretation of *Crawford*. The court addressed whether allowing a child witness to testify via closed circuit television violated the Confrontation Clause. The court distinguished *Crawford*, in part, on grounds that *Crawford* pertained only to testimonial hearsay and did not address nonhearsay in the form of video testimony. The court said: "It is important to recognize that *Crawford* did not hold that face-to-face confrontation is required in every case. Rather it held that the Confrontation Clause required cross-examination and unavailability before *testimonial hearsay* could be admitted into evidence." *Pack*, __ MJ at __, 2007 CAAF LEXIS 1656, slip op. at 10 (citing *Crawford*, 541 U.S. at 69) (emphasis added).

UNCHARGED MISCONDUCT AND THE CONSPIRACY

Appellate defense counsel further contend, however, consistent with appellant's defense counsel's argument at trial, that even under the co-conspirator analysis Dr. Theer's statements should not have been admitted under Mil. R. Evid. 801(d)(2)(E) because they were not in furtherance of the "charged" conspiracy to commit the premeditated murder of Capt. Theer. Rather, they argue the government was attempting to present evidence involving an uncharged conspiracy to obstruct justice. Therefore, our analysis does not end here. We must address the application of Mil. R. Evid. 404(b) to the conspiracy involved in this case.

Additional Facts

In addressing an objection to the admission of Dr. Theer's statements at trial, the military judge asked civilian defense counsel, "Doesn't [Mil. R. Evid.] 404(b), though, permit the government to bring out uncharged misconduct with a proper instruction to the members on how to deal with it?" Civilian defense counsel responded:

> There is some substantial question as to whether or not the government can bring out uncharged misconduct with respect to the misconduct that is a part of the charge itself because ordinarily that uncharged misconduct relates to some prior or subsequent misconduct that is indicative of modus operendi, that is

> indicative of plan. In this case what the government is attempting to do is to allege at trial two separate conspiracies and to, in effect, ask the panel to convict on one conspiracy by proving the existence of another.

The government, however, argued that it was the co-conspirators' "preplan" for Dr. Theer to "misinform" the police and "the conspiracy didn't end with just the shooting, the conspiracy continued on through the cover up . . . until the point where [Dr. Theer] started refusing to talk to police . . . [at] the end of January." The military judge stated:

> [T]he judge has to find when this conspiracy ended, when the object of the conspiracy ended, and if I find the object of the conspiracy ended at the time of the murder, then that's one thing, if I find that the actual object of the conspiracy was to commit the murder, hide it for a certain reason, then the complicity after the murder would still be in furtherance of the conspiracy. And that's all going to depend on what the evidence is.

Later in the trial during SSG Donald's testimony about the message he received from Dr. Theer regarding the 9mm pistol, the following discussion ensued:

> TC: Your honor, this is going to go to the alleged but uncharged conspiracy to obstruct justice.

MJ: This will basically be evidence in furtherance of showing a conspiracy that will lay the ground work of whether or not other statements should come in?

TC: Well, these statements right here are just the conspiracy to obstruct justice.

. . . .

MJ: And so you want me to consider this when I determine whether or not that both the conspiracy to commit murder and the conspiracy to obstruct justice existed in order for you to have the members hear the statements by [Dr.] Theer?

TC: Correct, sir.

CDC: I have no objection to that basis.

MJ: Well, I will consider it for that purpose.

ATC: Sir, it's also appropriate because . . . the acts of people sort of getting together after an event . . . can be use[d] . . . as substantive evidence proved with the conspiracy.

MJ: You have not charged [SSG Diamond] with conspiracy to obstruct justice.

ATC: No, sir, but . . . the post acts can be used as evidence in a conspiracy of murder. The people who conspire sometimes get together months later and do things to cover it up and that is admissible evidence to prove the

conspiracy of murder. . . .

Prior to the final ruling on admissibility of Dr. Theer's statements as those of a co-conspirator statement, trial counsel further argued appellant and Dr. Theer engaged in a "preplan concealment plan and that part of the plan [was] for [appellant] to defeat the [GSR] test which he did by shooting the next day. The other part — his part of this preplan was to establish an alibi which he did." According to the government theory, the conspiracy started in September 2000, "when the plan to move out of the country was established" and ended when Dr. Theer "told police she no longer wanted to talk to them . . . near the end of January" 2001. The government argued that Dr. Theer and appellant conspired to "obtain the profit they could gain from killing [Capt.] Theer" — the $500,000.00 of insurance money.

After extensive findings of fact, the military judge found by a preponderance of the evidence:

> [A] conspiracy existed between [Dr.] Theer and [appellant] to murder [Capt.] Theer which started in September of 2000 and a conspiracy to hide their complicity in any involvement in that murder which continued [until] the beginning of this trial . . . these statement were made while a conspiracy existed while the accused remained a part of that conspiracy in furtherance of that conspiracy.

In making this ruling and to determine the existence of a conspiracy, the military judge, with defense counsel's concurrence, throughout the trial, heard and considered evidence which did not come before the panel.

Law

A. Standard of Review

We review a "'military judge's decision to admit or exclude evidence . . . under an abuse of discretion standard.'" *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). When reviewing a mixed question of fact and law, such as the military judge's ruling on the admissibility of Dr. Theer's statements, "a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We apply a clearly-erroneous standard when reviewing a military judge's findings of fact, and a de novo standard when reviewing his conclusions of law. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *Ayala*, 43 M.J. at 298).

When a military judge abuses his discretion, this court must test the erroneous evidentiary ruling for prejudice, and may affirm the findings of guilty if the error was harmless, i.e., did not materially prejudice appellant's substantial rights. *Barnett*, 63 M.J. at 397 (citing UCMJ art. 59(a)). Prejudice is determined "'by weighing (1) the strength of the [g]overnment's case,

(2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *Id.* (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999), and citing *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985)).

B. Uncharged Misconduct

Military Rule of Evidence 404(b) provides for limited admissibility of evidence of "other crimes, wrongs, or acts" to show "motive, opportunity, intent,preparation, plan, knowledge, identity, or absence of mistake or accident." Such evidence, however, may not be used to prove an accused's character and to argue he acted "in conformity therewith." *Id.* Our superior court "has consistently held that Mil. R. Evid. 404(b) is a 'rule of inclusion.'" *United States v. Young*, 55 M.J. 193, 196 (C.A.A.F. 2001). "The test for admissibility of evidence of uncharged crimes is 'whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime[.]'" *Id.* (quoting *United States v. Taylor*, 53 M.J. 195, 199 (C.A.A.F. 2000)).

In *Reynolds*, 29 M.J. at 109, our superior court further established a threeprong test to determine whether uncharged misconduct may be admitted under Mil. R. Evid. 404(b). To be admissible, the uncharged misconduct at issue must fulfill each of the following three prongs:

> 1. Does the evidence reasonably support a finding by the court members that appellant

committed prior crimes, wrongs or acts?

2. What fact . . . of consequence is made more or less probable by the existence of this evidence?

3. Is the probative value . . . substantially outweighed by the danger of unfair prejudice?

Id. (alterations in original) (internal quotations and citations omitted). Prongs one and two test for logical relevance, while prong three tests for legal relevance. *Barnett*, 63 M.J. at 394. "The third prong of the *Reynolds* test requires application of the balancing test under Mil. R. Evid. 403. A military judge enjoys wide discretion under Mil. R. Evid. 403. Where the military judge properly weighs the evidence under Mil. R. Evid. 403 and articulates the reasons for admitting the evidence, we will reverse only for a clear abuse of discretion." *Young*, 55 M.J. at 196 (internal citations omitted). The *Reynolds* test applies to evidence of a crime, wrong, or act that precedes the charged offense as well as one that occurs after. *Id.*

C. Conspiracy

Article 81, UCMJ, provides that "[a]ny person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." The elements of this offense are as follows:

(1) That the accused entered into an agreement

> with one or more persons to commit an offense under the code; and
>
> (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

Manual for Courts-Martial, United States (2005 ed.) [hereinafter *MCM*], Part IV, para. 5.[8]

"It is well settled that a conspiracy ends when the objectives thereof are accomplished, if not earlier by abandonment of the aims or when any of the members of the joint enterprise withdraw therefrom." *United States v. Hooper*, 4 M.J. 830, 836 (A.F.C.M.R. 1978) (citing *United States v. Beverly*, 14 U.S.C.M.A. 468, 34 C.M.R. 248 (1964); *United States v. Salisbury*, 14 U.S.C.M.A. 171, 33 C.M.R. 383 (1963); *United States v. Miasel*, 8 U.S.C.M.A. 374, 24 C.M.R. 18 (1957)). The Supreme Court further explained:

> [T]he duration of a conspiracy [cannot] be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been

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[8]These provisions are identical to the provision in the 2000 *MCM* in effect at appellant's trial.

> accomplished. By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime. . . . Kidnappers in hiding, waiting for ransom, commit acts of concealment in furtherance of the objectives of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases the successful accomplishment of the crime necessitates concealment.

Grunewald v. United States, 353 U.S. 391, 405 (1957).

Moreover,

> When the activities of alleged co[-]conspirators are interdependent or mutually supportive of a common or single goal, a single conspiracy will be inferred. Thus, if the agreement contemplates the bringing to pass of a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, there is a single conspiracy rather than a series of

distinct conspiracies.

16 AM. JUR. 2d *Conspiracy* § 11 (2006) (footnotes omitted).

As the Supreme Court explained sometime ago, "the character and effect of a conspiracy [are] not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States v. Patten*, 226 U.S. 525, 544 (1913). "[T]he precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects." *United States v. Braverman*, 317 U.S. 49, 53 (1942), *cited with approval in United States v. Broce*, 488 U.S. 563, 570 (1989). "As such, it is ordinarily the agreement that forms the unit of prosecution for conspiracy, 'even if it contemplates the commission of several offenses.'" *United States v. Finlaysen*, 58 M.J. 824, 826 (Army Ct. Crim. App. 2000) (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 683 (3rd ed. 1982) (citing *Braverman*, 317 U.S. at 53)). *See also United States v. Pereira*, 53 M.J. 183, 184 (C.A.A.F. 2000) (finding single conspiracy to commit murder, robbery, and kidnapping).

Courts will view the totality of circumstances (i.e., a common goal, the nature of the scheme, overlapping participants in various dealings) to determine whether a single or multiple conspiracy exists. *Finlaysen*, 58 M.J. at 827 (citing 16 AM. JUR. 2d *Conspiracy* § 11 (2002)). Additionally, as our court has stated, in making charging decisions regarding conspiracy, "justice is not served by a charging decision

that knowingly exaggerates appellant's criminality or unreasonably increases his punitive exposure." *Id.* at 828. Moreover, "it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one." *United States v. Kissel*, 218 U.S. 601, 607 (1910).

D. Admissibility of Co-Conspirator Statements

Military Rule of Evidence Rule 801(d)(2)(E) indicates, with emphasis added, that "a statement by a co-conspirator of a party *during the course and in furtherance of* the conspiracy" is not hearsay. In *Bourjaily*, 483 U.S. at 171, the Supreme Court held that a court in its preliminary hearing must not only consider the statements sought to be admitted, but must also make factual determinations under Federal Rule of Evidence 801(d)(2)(E) as to whether the proponent of such evidence has proved by a preponderance of the evidence (1) existence of a conspiracy involving the declarant and the nonoffering party and (2) that the statement was made during and in furtherance of the conspiracy. Military Rule of Evidence 801(d)(2)(E) further codifies the *Bourjaily* decision by directing that "the contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered . . . ." Our court cannot overturn a military judge's finding that a statement was in furtherance of a conspiracy unless it was clearly erroneous. *United States v. James*, 1998 CCA LEXIS 78 (A.F. Ct. Crim.

App. 27 Jan.1998) (unpub.) (citing *United States v. Rahme*, 813 F.2d 31, 36 (2d Cir. 1987); *United States v. Deluna*, 763 F.2d 897, 909 (8th Cir. 1984), *cert. denied*, *Thomas v. United States*, 474 U.S. 980 (1985)).

The key prerequisite then for admissibility of co-conspirator statements is whether the co-conspirator made the statement "in furtherance of the conspiracy charged" rather than "in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment." *Krulewitch v. United States*, 336 U.S. 440, 444 (1949). Courts have found co-conspirator confessions made before arrest as "in furtherance of" and post-arrest confessions not "in furtherance of." 44 AM. CRIM. L. 523, 547-48 (2007).[9] Federal courts have also held coconspirator statements admissible under the Rules of Evidence "even if the defendant is not charged with the conspiracy" when the conspiracy is "closely related or 'factually intertwined' with the crime for which the defendant is charged." *Id.*

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[9]Citing *United States v. Brooks*, 82 F.3d 50, 53-54 (2d Cir. 1996) (admitting statements made to undercover officer prior to arrest); *United States v. Segura-Gallegos*, 41 F.3d 1266, 1272 (9th Cir. 1994) (holding statements made to undercover police officer not hearsay because statements were "in furtherance" of conspiracy); *Fiswick v. United States*, 329 U.S. 211, 217 (1946) (finding post-arrest admission or confession is not in furtherance of conspiracy); *United States v. Lombard*, 72 F.3d 170, 189 (1st Cir. 1995) (holding arrest terminates conspiracy, but allowing declaration based on other grounds); *United States v. Alonzo*, 991 F.2d 1422, 1425 (8th Cir. 1993) (stating confessions are not in furtherance of conspiracy).

at 546-47.[10]

> [A] statement made by one conspirator during the life of the conspiracy, and in pursuance of it, may be accepted in evidence against all. . . .
>
> Federal authorities are legion which hold that statements made by a conspirator, once the common enterprise has reached its end, are inadmissible against co[-]conspirators. . . . However, not infrequently the commission of a criminal offense is followed immediately by an active attempt to conceal it. Thus, a rule has arisen to the effect that the declarations of a co[-]conspirator are admissible against a co[-]conspirator not

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[10]Citing *United States v. Mahasin*, 362 F.3d 1071, 1084 (8th Cir. 2004) (stating that it is "not necessary for the declarant to have been formally charged as a co-conspirator or even be identified, so long as the statement in question was itself sufficiently reliable in demonstrating the applicability of Rule 801(d)(2)(E)."); *United States v. Skidmore*, 254 F.3d 635, 638 (7th Cir. 2001) (stating government need not charge conspiracy in order for co-conspirator statement to be admitted); *United States v. Ellis*, 156 F.3d 493, 497 (3d Cir. 1998) (stating out of court statements may be admissible even if defendant is not formally charged with conspiracy); *United States v. Asibor*, 109 F.3d 1023, 1034 (5th Cir. 1997) (allowing evidence of uncharged offenses because they arise out of the same transactions as the offenses charged); *Ellis*, 156 F.3d at 498 (applying "factually intertwined" test to determine relevance of 801(d)(2)(E) evidence); *United States v. Grossman*, 843 R2d 78, 83 (2d Cir. 1988) (stating conspiracy must be "factually intertwined" with offense charged).

> only when they are made during the perpetration of the offense, but also when expressed during the course of a subsequent attempt to conceal the crime and relating to it.

United States v. Taylor, 6 U.S.C.M.A. 289, 293, 20 C.M.R. 5, 9 (C.M.A. 1955) (citing WHARTON, CRIMINAL EVIDENCE, 11th ed. § 715). Moreover,

> [W]hen a concealment is shown to be in furtherance of the conspiracy, [co-conspirator] statements *are* admissible in evidence. *Id.* at 294; 20 C.M.R. at 11. "[W]hether attempts to conceal a conspiracy are in furtherance of the ongoing conspiracy depends on the facts of each case . . . . In conspiracies where a main objective has not been attained or abandoned and concealment is essential to success of that objective, attempts to conceal the conspiracy are made in furtherance of the conspiracy."

United States v. Howard, 770 F.2d. 57, 61 (6th Cir. 1985).

Analysis

To understand appellate defense counsel's somewhat convoluted argument, we must read Assignment of Error (AE) II in conjunction with AE V. Appellant asserts in AE II, "the military judge committed plain error when he failed to give

appropriately tailored uncharged misconduct instructions relative to the inordinate amount of evidence admitted pertaining to the *uncharged* conspiracy issues." Appellate defense counsel claim the "uncharged misconduct" is the "uncharged conspiracy" to obstruct justice by lying to law enforcement. Additionally, appellate defense counsel's brief, with emphasis added, explains: "The issue here in this Point *is not whether the Military Judge erred in admitting this evidence* . . . but whether once he made the decision to admit it, such mandated an appropriate limiting instruction."

However, in AE V their brief asserts: "The military judge committed plain error of a [C]onstitutional magnitude when he admitted various 'hearsay' statements of [Dr.] Theer under [Mil. R. Evid.] 801(d)(2)(E) . . . as statements of a coconspirator . . . ." In that portion of their brief appellate defense counsel explain that appellant was only charged with conspiring on or about "17 [December] 2000 with Dr. Theer to murder Capt[.] Frank Theer with premeditation," but the military judge allowed the government to present "irrelevant" evidence regarding "uncharged conspiracy B" with Dr. Theer "*after* 17 [December] 2000 . . . to obstruct justice by wrongfully disposing of [a] 9mm pistol" and "uncharged conspiracy C" with Dr. Theer "*after* 17 [December] 2000 . . . to 'cover up' the 'conspiracy to murder' Capt[.] Theer." They further assert: "It was simply a tactical ruse to get a boatload of otherwise *inadmissible hearsay* before the members and as predicted by the Defense, the Government would 'prove' the *uncharged conspiracies* and then claim that such proved the charged

conspiracy."

We find appellant's argument regarding the instructions does not merit discussion,[11] but we will review the admissibility of the co-conspirator's statements as they relate to "uncharged misconduct." Although some of Dr. Theer's statements may have also concerned efforts to cover up the murder, we cannot conclude these statements related *only* to uncharged misconduct. On the contrary, we find all of the admitted statements were relevant to prove the charged conspiracy to commit the premeditated murder of Dr. Theer's husband. Every criminal conspiracy has goals or objectives. In this case, the government's theory, supported by the evidence, was that the main objectives of the conspiracy to murder Dr. Theer's husband were to allow appellant and Dr. Theer to be together and allow them to enjoy the life insurance proceeds. During their trip to Saba Island months prior to the murder, the two held themselves out as fiancées intending to marry and set up a life on the island for several years. Doctor Theer and appellant could not have achieved these goals unless they successfully hid their criminal involvement. Accordingly, to show motive, intent, and plan, the government was permitted to introduce evidence of "acts of concealment done in furtherance of [these] main criminal objectives." *Grunewald*, 353 U.S. at 391.

The result might be different if the facts of this case were changed. For example, if appellant had been charged only with an unlawful accidental killing, then

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[11] *See* footnote 2, *supra*.

evidence of an "uncharged conspiracy aimed at preventing detection and punishment" of this crime would not be admissible under Mil. R. Evid. 801(d)(2)(e). *Krulewitch*, 336 U.S. at 444. The result might also be different if appellant had been charged with conspiring with Dr. Theer to commit murder, but the apparent motivation was only spite and revenge, then "acts of concealments done after these central objectives had been attained" also would not be admissible. *Grunewald*, 353 U.S. at 405. The actual case, however, does not resemble these hypothetical examples. On the contrary, Dr. Theer's statements were relevant to the goals and objectives of the conspiracy to kill her husband.

Additionally, for a separate reason, "[w]e hold that the military judge did not abuse his discretion . . . because the uncharged misconduct was admissible for a separate limited purpose, to show the subject matter and context of a conversation . . . ." *Young*, 55 M.J. at 196. The probative value of this evidence (to provide the context for appellant's obstruction of justice charge) substantially outweighed the danger of unfair prejudice. *See id.* (Sullivan, J. concurring in part and in the result and dissenting in part).

Moreover, as discussed in our analysis of the Confrontation Clause, even if the military judge erred in admitting Dr. Theer's statements, these statements were cumulative or not required. Other evidence properly before the court independently established either the same points or separate facts sufficient to prove the required elements of the offenses.

We agree with appellant's defense counsel's assessment at trial that "[i]f this conspiracy was planned and executed as the prosecution says that it was,[12] it was badly conceived, incompetently executed and any attempts to hide it and cover it up were done stupidly." Nevertheless, we easily conclude that if the military judge did erroneously admit Dr. Theer's co-conspirator statements those declarations were not "the weight that tipped the scales against" appellant. *Krulewitch*, 336 U.S. at 445. Error, if any, was harmless beyond a reasonable doubt.

CONCLUSION

We have considered appellant's other assignment of error, and those matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

Accordingly, the findings of guilty and the sentence are affirmed.

Senior Judge HOLDEN and Judge WALBURN concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

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[12] Our review indicates strong evidence that it was planned and executed as the prosecution asserted.

APPENDIX "C"

Not Reported in M.J., 2010 WL 3529500 (Army Ct.Crim.App.)

U.S. Army Court of Criminal Appeals.

UNITED STATES, Appellee

v.

Staff Sergeant **John** M. **DIAMOND**, United States Army, Appellant.

ARMY 20010761.

26 May 2010.

82d Airborne Division and Fort Bragg, Patrick J. Parrish, Military Judge (trial and DuBay), Lieutenant Colonel W. Renn Gade, Staff Judge Advocate (trial and recommendation), Lieutenant Colonel Thomas E. Ayers, Staff Judge Advocate (addendum), Major Jessica A. Golembiewski, Acting Staff Judge Advocate (DuBay).

For Appellant: Captain Jennifer A. Parker, JA; Donald G. Rehkopf, Jr. Esquire (on brief following remand).

For Appellee: Colonel Norman F.J. Allen III, JA; Lieutenant Colonel Martha L. Foss, JA; Major Adam S. Kazin, JA (on brief following remand).

Before TOZZI, HAM, and BAIME, Appellate Military Judges.

MEMORANDUM OPINION ON REMAND

BAIME, Judge:

*1 A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of violating a lawful general regulation by wrongfully transporting and storing a privately-owned weapon in his vehicle and committing adultery on divers occasions, in violation of Articles 92 and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 892 and 934. A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of conspiring to commit premeditated murder, premeditated murder, and obstructing justice, in violation of Articles 81, 118, and 134, UCMJ, 10 U.S.C. §§ 881, 918, and 934. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for life without the possibility of parole, forfeiture of all pay and allowances, and reduction to Private E1.

On 21 December 2007, we affirmed the findings and sentence. *United States v. Diamond*, 65 M.J. 876 (Army Ct.Crim.App.2007). On 23 January 2009, our superior court granted appellant's petition for review on the following issue:

WHETHER THE NAMED CO-CONSPIRATOR, MICHELLE THEER, PAID APPELLANT'S CIVILIAN DEFENSE COUNSEL RETAINER AND, IF SO, WHETHER THIS CONFLICT OF INTEREST WAS DISCLOSED TO THE COURT.

The United States Court of Appeals for the Armed Forces remanded the case to us "for further appellate inquiry on the granted issue." After receiving multiple competing post-trial affidavits concerning the answers to the questions posed in the remanded issue, on 17 December 2009, we returned the record of trial to The Judge Advocate General and ordered a limited hearing pursuant to *United States v. DuBay,* 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). Our 17 December 2009 order is attached to this opinion as Appendix 1. On 22 and 23 February 2010, the original military judge presided over a *DuBay* hearing at Fort Bragg, North Carolina.

After careful review of the entire record of trial, all post-trial submissions, our original opinion, and the *DuBay* hearing, we answer the remanded issue in favor of the government and affirm the findings and sentence.

FACTS

Our original opinion contains a detailed description of the facts surrounding the murder of Dr. Michelle Theer's husband, United States Air Force Captain (Capt.) Frank M. Theer. *See Diamond,* 65 M.J. at 877-82. A recitation of the facts is not necessary, but for purposes of this opinion, it is important to know appellant was convicted of conspiring with Dr. Theer to murder Capt. Theer, and Dr. Theer was ultimately convicted in the Superior Court Division of the State of North Carolina court for the first-degree murder of her husband and sentenced to life in prison.

Post-trial, appellant alleged Dr. Theer paid the retainer fee for his civilian defense counsel, Messrs. Coy Brewer and Ronnie Mitchell, which created a conflict of interest. He also alleged counsel never disclosed this conflict to the court. After our superior court remanded the case to us, we ordered affidavits from Messrs. Brewer and Mitchell, who denied Dr. Theer paid the retainer. Appellant also submitted affidavits from numerous family members alleging Dr. Theer paid the retainer fee. Faced with competing affidavits, we ordered a *DuBay* hearing.[1]

*2 During the *DuBay* hearing, appellant testified he was in pretrial confinement at Camp Lejeune and during an appointment he asked Mr. Brewer how appellant was going to pay his retainer fee. Appellant testified he was told "Don't worry about it," and "that Michelle took care of everything and that all I needed to know was to keep my mouth shut and they would contact me at Camp Lejeune and we went from there." In contrast, both Mr. Brewer and Mr. Mitchell testified they were not aware of the retainer's source.

After the conclusion of the *DuBay* hearing, the military judge made findings of fact and conclusions of law and attached them to the *DuBay* record. Most important and relevant to the first part of the

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[1] *See generally United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F.1997) ("Article 66(c) does not authorize Courts of Criminal Appeals to decide disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties.").

remanded issue, the military judge found "Ms. Theer paid the retainer fee of $1,500 for the appellant with money orders," and "Neither Mr. Brewer nor Mr. Mitchell was aware that Ms. Theer was the source of funds for the retainer fee. Neither Ms. Theer nor the appellant told either Mr. Brewer or Mr. Mitchell that Ms. Theer was the source of the funds for the retainer fee." Pertaining to the issue of disclosure, the military judge found:

> The civilian defense counsel did not discuss Ms. Theer as the source of the funding with the appellant since Ms. Theer was not known to be the source of the funds for the retainer fee. The civilian defense counsel did not discuss any apparent or actual conflict of interest with the appellant because they were unaware of any such conflict. The civilian defense counsel did not disclose Ms. Theer's funding of the retainer fee with the court because they were unaware she was the funding source.

The military judge also found "Ms. Theer did not direct any part of the defense." After our review, we find nothing clearly erroneous in these findings of fact and conclusions of law and adopt them in full. A copy of the findings are attached as Appendix 2 to this opinion.

LAW

Our court reviews the *DuBay* judge's factual

findings under a clearly erroneous standard. *United States v. Clark,* 55 M.J. 555, 560 (Army Ct.Crim.App.2001). "Allegations of conflicts of interest during ineffective assistance of counsel inquiries are reviewed *de novo.*" *United States v. Calhoun,* 49 M.J. 485 (C .A.A.F.1998).

Military accused's "right to effective assistance of counsel means the right to effective assistance of conflict-free counsel." *United States v. Carter,* 40 M.J. 102, 105 (C.M.A.1994). "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." *Cuyler v. Sullivan,* 446 U.S. 335, 346 (1980) (footnote omitted). "An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter." *Mickens v. Taylor,* 535 U.S. 162, 182 (2002) (Stevens, J., dissenting) (quoting *Williams v. Reed,* 29 F. Cas. 1386, 1390 (C.C.Me.1824)).

***3** "Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise." *Wood v. Georgia,* 450 U.S. 261, 268-69 (1981) (footnote omitted). An attorney can only serve one master. *See Mickens,* 535 U.S. at 172; *Cuyler,* 446 U.S. at 349; *Glasser v. United States,* 315 U.S. 60, 75 (1942). One risk is the party paying the fees may have an interest in determining the outcome of the other party's legal case to assist the payer's ultimate legal interests. *See*

Wood, 450 U.S. at 269-70.

In cases alleging a conflict of interest in an attorney's representation, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler*, 446 U.S. at 348. *See also United States v. Thompson*, 51 M.J. 434-35 (C.A.A.F.1999); *United States v. Hicks*, 52 M.J. 70, 72 (C.A.A.F.1999). "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler*, 446 U.S. at 349-50 (citations omitted).

An actual conflict of interest does not always arise when a civilian counsel's retainer fee is paid by a codefendant. *See Danner v. United States*, 820 F.2d 1166, 1170 (11th Cir.1987). In *Danner*, the court found the attorney's representation at trial was sufficient and free from any conflict after one codefendant paid a portion of the retainer fee for the other codefendant (Danner) if the latter agreed to use his counsel. *Id.* Ultimately, both codefendants were represented by different attorneys, but Danner's attorney was paid from the original fees. *Id. See also United States v. Wells*, 394 F.3d 725 (9th Cir.2005). In *Wells*, one codefendant paid another codefendant's attorney fees; the issue before the Ninth Circuit was "whether the fee arrangement, which created a theoretical division of loyalties, adversely affected" the attorney's

representation. *Id.* at 734. The court found "no evidence that the fee arrangement affected [the attorney's] handling of any issue in the case" and concluded the attorney effectively represented his client. *Id.* at 736.

DISCUSSION

The military judge found Dr. Theer paid the retainer fee for appellant's civilian defense counsel, and the source of the funds was never disclosed to the court because the attorneys were unaware Dr. Theer paid the retainer fee. Since appellant raised the conflict issue post-trial, he must demonstrate an actual conflict of interest occurred to entitle him to any relief. Appellant has failed to meet this burden because in this case, no actual or apparent conflict of interest existed. First, as the military judge found, the civilian defense counsel did not know who paid their retainer fee. The attorneys' lack of knowledge allowed them to be "mentally free of competing interests," and appellant "was afforded conflict-free counsel." *Carter*, 40 M.J. at 106. Second, Dr. Theer never directed any part of the defense strategy. In fact, the military judge found her "payment of the retainer fee had no impact on the advocacy by the defense counsel either individually or as a team." Third, the amount of the retainer fee, $1,500.00, was "a small percentage of the total amount of the funds paid to Mr. Brewer" compared to the amount of fees paid to the civilian defense team by appellant's family, $11,500.00. Simply stated, no division of loyalties existed.

*4 Although we answer both parts of the

remanded issue in favor of appellant, unique factors exist denying appellant any relief. We find although the payment was made by appellant's co-conspirator, no conflict of interest, and thus, no duty to notify the court existed because civilian defense counsel were unaware Dr. Theer paid the fee in the first place.[2]

CONCLUSION

Accordingly, the findings of guilty and the sentence are affirmed.

Senior Judge TOZZI and Judge HAM concur.

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[2]Appellant was aware Dr. Theer paid the retainer fee when he hired his civilian defense counsel. However, in light of the fact that those *attorneys* did not know who paid the fee, we need not decide whether appellant waived his right to object to any alleged conflict or whether that right is even waiveable in this situation.

APPENDIX "D"

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before

TOZZI, HAM, and BAIME

Appellate Military Judges

UNITED STATES, Appellee

v.

Staff Sergeant JOHN M. DIAMOND
United States Army, Appellant

ARMY 20010761

ORDER

On consideration of the Motion for Reconsideration and Suggestion for Reconsideration *En Banc*, the Motion is DENIED.

DATE: 12 July 2010

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

APPENDIX "E"

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 11-032
Tuesday, October 19, 2010

PETITIONS FOR GRANT OF REVIEW DENIED

No. 08-0365/AR. U.S. v. John M. DIAMOND. CCA 20010761.

APPENDIX "F"

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 11-072
Monday, December 20, 2010

INTERLOCUTORY ORDERS

No. 08-0365/AR. U.S. v. John M. DIAMOND. CCA 20010761.On consideration of Appellant's motion for late filing and to suspend Rules, and the petition for reconsideration, it is ordered that said motion is hereby denied, and that said petition for reconsideration is hereby dismissed.

SUPREME COURT, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

No. 10-922

In the Supreme Court of the United States

JOHN M. DIAMOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF FOR THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

EUGENE R. FIDELL
Counsel of Record
127 Wall Street
New Haven, CT 06511
(203) 432-4852
eugene.fidell@yale.edu

STEPHEN A. SALTZBURG
2000 H Street, N.W.
Washington, DC 20052
(202) 994-7089

MICHELLE M. LINDO MCCLUER
4801 Massachusetts Ave., N.W.
Washington, DC 20016
(202) 274-4322

February 2011

Attorneys for Amicus Curiae

QUESTIONS PRESENTED

The petition for a writ of certiorari notes the following Question Presented:

> Are statements to police investigating a crime *per se* nontestimonial for purposes of the Confrontation Clause if made by a person alleged to be a co-conspirator of the accused?

Amicus National Institute of Military Justice believes that the following additional questions are presented:

> May certiorari be granted where the Court of Appeals for the Armed Forces grants discretionary review and remands for further proceedings and, following those proceedings, denies further discretionary review?

> Is review under 28 U.S.C. § 1259 restricted to the particular issue(s) as to which the Court of Appeals for the Armed Forces granted review or does it extend to all issues in the case?

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INTEREST OF THE AMICUS CURIAE*

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. Its advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but most of whom have served as military lawyers. NIMJ directors and advisors have practiced before the United States Court of Appeals for the Armed Forces ("CAAF"), and have served on its Rules Advisory Committee as well as the statutory Committee on Military Justice.

NIMJ appears regularly as an *amicus curiae* before CAAF and other federal courts. It was an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004).

NIMJ is actively involved in public education on military law through online media (its website, www.wcl.american.edu/nimj and its blog, www.nimjblog.org), and hard-copy publications such as the *Guide to the Rules of Practice and Procedure*

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* Amicus gave notice to all parties at least 10 days before this brief's due date. Counsel for all parties have consented to the filing of this brief; copies of their letters have been filed with the Clerk. Counsel for NIMJ have authored this brief in whole, and no person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of this brief. NIMJ takes no position on whether petitioner should prevail on the Confrontation Clause issue.

for the United States Court of Appeals for the Armed Forces (13th ed. 2010).

SUMMARY OF ARGUMENT

The petition is properly filed because CAAF initially granted review and relief. Based on the plain meaning of 28 U.S.C. § 1259, this Court's review extends to all questions petitioner seeks to raise, not merely those as to which CAAF granted review. CAAF's effort, by rule, to arrogate to itself a power to block this Court's review of cases in which CAAF had previously granted review is improper. CAAF is the only appellate court in the country that (a) asks a petitioner for discretionary review what issues he or she wishes to raise in *this* Court, and (b) affirmatively maintains that it may deny review in order to assure that *this* Court will not be able to consider a case or an issue in a case that CAAF wishes to insulate from review on certiorari.

ARGUMENT

I

The petition for a writ of certiorari is within the Court's jurisdiction

Article I, § 8, clause 14, of the Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces." Under this authority, in 1950 Congress passed the Uniform Code of Military Justice ("UCMJ") for military personnel in all branches of the armed forces.[1] Coupled with the Rules for Courts-Martial and Military Rules of Evidence promulgated by the President

[1] 10 U.S.C. §§ 801–946.

in the *Manual for Courts-Martial*,[2] the UCMJ provides a comprehensive framework for the administration of military justice. The UCMJ establishes several layers of appellate review,[3] including (following enactment of the Military Justice Act of 1983)[4] review here on writ of certiorari for some actions by CAAF.[5]

As is true of all Article I courts, the jurisdiction of the appellate military courts is confined to what Congress specifies by statute.[6] Cases with sentences that include confinement for one year or longer or a punitive discharge are automatically reviewed by the service branch's court of criminal appeals. The Army Court of Criminal Appeals automatically reviewed petitioner's case because he was sentenced to be confined for life without parole and a dishonorable discharge.[7]

Unlike the service courts' jurisdiction, in noncapital cases such as this, CAAF's review is discretionary.[8] That court granted review of petitioner's case and summarily remanded for "additional appel-

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[2] *See* UCMJ Art. 36, 10 U.S.C. § 836.

[3] UCMJ Arts. 66-67, 10 U.S.C. §§ 866-67. *See generally Weiss v. United States*, 510 U.S. 163, 166-69 (1994).

[4] Pub. L. 98-209, 310(a)(1), 97 Stat. 1405.

[5] UCMJ Art. 67a, 10 U.S.C. § 867a; 28 U.S.C. § 1259.

[6] *See Clinton v. Goldsmith*, 526 U.S. 529, 533-34 (1999).

[7] *See* UCMJ Art. 66(b)(1), 10 U.S.C. § 866(b)(1); *United States v. Diamond*, 65 M.J. 876 (Army Ct. Crim. App. 2007) (Pet. App. B).

[8] UCMJ Art. 67(a)(3), 10 U.S.C. § 67(a)(3).

late inquiry" by the Army Court.[9] Following the service court's decision on remand,[10] petitioner again sought review by CAAF, but this time his petition was denied.[11]

The petition for certiorari is within this Court's jurisdiction. Even though CAAF denied review the second time around, it had earlier granted review. This Court has jurisdiction over court-martial cases where CAAF has granted either review of or relief in the case.[12] A remand constitutes "relief" for this purpose.[13] Neither Article 67a(a) of the UCMJ[14] nor § 1259 of the Judicial Code limits this Court's jurisdiction to cases in which CAAF granted review the last time the case came to that court. Rather, the plain language indicates that CAAF need only have granted review or relief at some point in the appellate process.[15]

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[9] *United States v. Diamond*, 67 M.J. 247 (C.A.A.F. 2009) (mem.). The order granting review noted a single issue: "WHETHER THE NAMED CO-CONSPIRATOR, MICHELLE THEER, PAID APPELLANT'S CIVILIAN DEFENSE COUNSEL RETAINER AND, IF SO, WHETHER THIS CONFLICT OF INTEREST WAS DISCLOSED TO THE COURT." (Pet. App. A.)

[10] *United States v. Diamond*, 2010 CCA LEXIS 66 (Army Ct. Crim. App. May 26, 2010) (unpub. op.)(Pet. App. C.)

[11] *United States v. Diamond*, 2010 CAAF LEXIS 903 (C.A.A.F. Oct. 19, 2010) (Pet. App. E.)

[12] 28 U.S.C. §§ 1259(3)-(4).

[13] *United States v. Denedo*, 129 S. Ct. 2213, 2219-20 (2009).

[14] 10 U.S.C. § 867a(a).

[15] *See* 28 U.S.C. §§ 1259(3)-(4).

A case that has once been the subject of a grant of review or relief by CAAF remains the same "case" for purposes of certiorari jurisdiction when it returns to CAAF following a remand to one of the service courts.[16] In other words, having once opened the door to this Court's jurisdiction by granting review, it would be contrary to the two governing statutes to treat CAAF as having yet another opportunity to bar the way by denying review, as happened here. It would also compel litigants to seek review here of any CAAF remand out of an abundance of caution, even though they might have substantially prevailed by gaining a remand that could lead to a victory on the merits. Such an interpretation, even if it had a basis in the text of the statute, would have little to recommend it as a matter of sound judicial administration.

II

This Court has jurisdiction over "cases" in which CAAF has granted review or relief, and is not limited to the particular "issue(s)" as to which CAAF has granted review

Petitioner's Question Presented is not the issue CAAF noted when it granted review in 2009, although it is an issue on which Petitioner sought review. However, that does not deprive this Court of jurisdiction.

The Solicitor General, perhaps influenced by CAAF's practice of issuing orders that purport to grant review on particular issues, has repeatedly in-

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[16] *See* C.A.A.F.R. 21(b)(5)(G).

sisted that review by petition for a writ of certiorari for court-martial cases is available only with respect to issues on which CAAF has granted review.[17]

That view is mistaken. Plainly, CAAF can specify in the grant of review fewer than all of the issues raised by an appellant. This is clear from the third sentence of Article 67(c).[18] The same sentence provides that CAAF has a duty to act only with respect to those issues. However, under the initial clause of Article 67(a), the entire record in the case must be reviewed, and under the plain language of Article 67(a)(3), it is the "case" that is reviewed. CAAF orders that identify particular issues are properly understood as marking the metes and bounds of what the court *must* act on (not the larger universe of what it *may* act on), and as a practical matter merely as limiting the briefing to particular issues – a routine power that *any* appellate court enjoys, including this one. To view an order granting review in any other light would pit the issue-oriented third sentence of Article 67(c) against the case-oriented terms of Article 67(a).

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[17] *See, e.g.*, Brief for the Respondent, *Stevenson v. United States*, No. 07-1397, at 7-8, *available at* http://www.usdoj.gov/osg/briefs/2008/0responses/2007-1397.resp.pdf; Brief for the Respondent, *McKeel v. United States*, No. 06-58, at 5-6, *available at* http://www.usdoj.gov/osg/briefs/2006/0responses/2006-0058.resp.pdf. Given this background, it is reasonable to anticipate that the Solicitor General will make this argument in opposing certiorari. This brief is NIMJ's only opportunity to present its views on this important and recurring issue.

[18] 10 U.S.C. § 867(c).

The statutory text and, if more were needed, the legislative history, confirms our position. When Congress expanded the certiorari jurisdiction to include cases arising under the UCMJ, it did so with respect to "cases" in which CAAF's predecessor – the Court of Military Appeals – had granted review. This is in contrast to the approach taken earlier in the legislative process of permitting certiorari review only of "issues" as to which that court had granted review.[19]

Whether certiorari may be granted with respect to an issue CAAF does not list when granting review is an "unresolved question."[20] This is a recurring matter. When CAAF grants review, its order typically lists fewer than all of the issues presented by the appellant in what is called, in CAAF practice, the "supplement" to the petition for a grant of review.[21] Indeed, correctly or not, it occasionally grants review in a case in which the appellant has cited no issues at all,[22] or its order granting review

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[19] *See generally* Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, in *Evolving Military Justice* 150-51 & nn.12-15 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002).

[20] *See* Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward A. Hartnett, *Supreme Court Practice* 128 n.103 (9th ed. 2007).

[21] *See* C.A.A.F.R. 21.

[22] *E.g., United States v. Dalrymple*, 14 U.S.C.M.A. 307, 308-09, 34 C.M.R. 87, 88-89 (C.M.A. 1963); *see generally* Eugene R. Fidell, *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* 156 (13th ed. 2010) (collecting cases).

may list one or more issues of its own fashioning (so-called "specified" issues)[23] or it may rephrase an issue, just as this Court does on occasion.

Even if the Court were otherwise disposed to deny the petition at bar in light of the considerations set forth in Rule 10, it will be important to the military justice system – even more than the proper disposition of petitioner's Question Presented – to make clear, in keeping with both the text and legislative history of Article 67a and section 1259, that a certiorari petition will lie as to any issue in a case in which CAAF has granted review, regardless of whether the order granting review mentions the particular issue(s) with respect to which certiorari is later sought.

The Court indicated in *Denedo*[24] that the statute granting jurisdiction over court-martial cases should not be read parsimoniously. At issue there was a contention by a Navy enlisted man that the government's petition lay outside the Court's jurisdiction. Here the shoe is on the other foot, but the construction of the statute must remain constant. It is disturbing enough that Congress has given the military personnel who defend the Nation narrower access to this Court than the untrammeled access enjoyed by all other petitioners for certiorari, including those

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[23] C.A.A.F.R. 5, 21(d). CAAF uses the term "specified" in a narrower sense than does Article 67(c). Under that provision, any issue on which it grants review is "specified," whereas in CAAF parlance, a "specified" issue is one entirely framed by the court and not "assigned" by the appellant. CAAF distinguishes between the two in orders granting review.

[24] 129 S. Ct. at 2219.

convicted by military commissions.[25] There is emphatically no reason to make that discrepancy all the more pronounced by construing the grant of certiorari jurisdiction in court-martial cases more narrowly than the statutory text or legislative history warrant.

III

CAAF cannot limit access to this Court by changing its own rules

As if the Solicitor General's cramped reading were not enough, CAAF itself further confounded the system Congress put in place when it extended the certiorari jurisdiction to courts-martial. The UCMJ requires "good cause" for a grant of review by CAAF.[26] At the time petitioner obtained a grant of review in 2009, CAAF's Rule 21(b)(5)(G) unmistakably indicated that the court would grant review of cases it had earlier remanded for further review or action:

> ... The supplement shall contain:
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> * * *
>
> (5) A direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to

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[25] *Compare* 28 U.S.C. § 1254 *with* 28 U.S.C. § 1259; *see* 10 U.S.C. § 867a(a); Military Commissions Act of 2009, 28 U.S.C. § 950g(d); *see also The Equal Justice for Our Military Act of 2009. Hearing on H.R. 569 Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009) (Statement of Dwight H. Sullivan).

[26] UCMJ Art. 67(a)(3), 10 U.S.C. § 867(a)(3).

> the substantive rights of the appellant. Where applicable, the supplement to the petition shall also indicate whether the court below has:
>
> * * *
>
> (G) taken inadequate corrective action after remand by the Court subsequent to grant of an earlier petition in the same case and that appellant wishes to seek review from the Supreme Court of the United States...[27]

This rule was promulgated in 1990.[28] CAAF changed it in 2010, while petitioner's case was still on review, to require appellants for the first time to specify "the issue or issues on which certiorari review would be sought, whether related to the remand or to the original decision by this court."[29] CAAF's notice of the proposed change explained:

> The recent practice of the Court has been to grant petitions for grant of review in cases that have been previously remanded ... and are returned to the Court on a second petition. The grant of review is intended to protect the right to seek certiorari review at the

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[27] C.A.A.F.R. 21(b)(5)(G) (pre-2010 version).

[28] *In re Changes of Rules*, 31 M.J. 465 (C.A.A.F. July 16, 1990). *See generally Rules Guide*, *supra* note 22, at 151-52, 158-59.

[29] C.A.A.F.R. 21(b)(5)(G) (2010 revision) ("(G) taken inadequate corrective action after remand by the Court subsequent to grant of an earlier petition in the same case and that appellant wishes to seek review in the Supreme Court of the United States specifying the issue or issues on which certiorari review would be sought, whether related to the remand or to the original decision by this Court").

> Supreme Court, and may be accompanied by a summary order of affirmance. The proposed change to the Rule ... will make it clear that there is no right to further review in this Court in all remanded cases, and also provide a more orderly process for identifying the issues that are being preserved for review on petition for certiorari. The Court can then decide whether to grant and affirm or take other action it deems appropriate.[30]

This comment properly acknowledges CAAF's history of preserving appellants' opportunity to petition for certiorari in the few cases in which it has granted discretionary review.[31] It goes on to imply that CAAF had been wrong for 20 years to preserve the right to petition, even though this Court's review is discretionary, and only a small percentage of courts-martial are reviewed by CAAF. The import of the rule change is that litigants whose cases that are granted discretionary review by CAAF and remanded to a service court for further action may lose the option of petitioning this Court for a writ of cer-

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[30] Notices, 75 Fed. Reg. 8683 (2010).

[31] The explanation shows the reasonableness of petitioner's reliance on past CAAF practice in not seeking certiorari with respect to CAAF's 2009 grant-and-remand. Between that grant of review and the 2010 denial, CAAF abandoned not only its policy of automatically granting post-remand petitions but also its practice of automatically granting petitions for review in cases where, as here, the approved sentence includes confinement for 30 or more years. *See* Michelle Lindo McCluer, *Training Highlights New CAAF Rules*, Sept. 8, 2010, *available at* http://www.nimjblog.org/2010/09/training-highlights-new-caaf-rules.html. This aggravates the unfairness of the 2010 denial of review.

tiorari. To say there is "no right to further review" after a case is remanded is to create a conflict with section 1259, which grants the Court certiorari jurisdiction over, *inter alia*, all cases in which CAAF had granted relief.[32] As *Denedo* held, a CAAF remand qualifies as "granting relief" for purposes of this Court's jurisdiction over court-martial appeals.

The 2010 rule change requires appellants who seek to show good cause for a post-remand grant of CAAF review to anticipate what they might ask of *this* Court in a certiorari petition. This effectively requires military appellants alone among the universe of criminal appellants to front-load possible certiorari-petition Questions Presented, and worse yet, to subject them to screening by a lower court.

Every defendant in a criminal case in a civilian court can apply for review in this Court by first seeking direct review in the system in which he or she was tried and then, not having prevailed in a lower appellate court, seek review here. Only men and women in uniform – those who have served the country but have been convicted of a crime – cannot automatically seek review in this Court. CAAF unquestionably has the right under the system Congress created, for better or worse, to serve as a "gatekeeper" of sorts for this Court.

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[32] Under 28 U.S.C. § 1259, the Court may review CAAF's decisions if (1) the sentence extends to death; (2) the Judge Advocate General certifies the case to CAAF; (3) CAAF has granted review upon a petition of the accused showing good cause; and in (4) "Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief."

But there are limits to CAAF's gatekeeper role. One is that it cannot claim that a defendant who has obtained relief in the form of a remand has not qualified to seek review here. Another is that only *this* Court, not CAAF, can require litigants to state the issues on which they may seek a writ of certiorari. CAAF's new "good cause" rule thus exceeds that court's power: whether a case merits review on certiorari is for *this* Court to decide, not some lower court. Indeed, CAAF's own rules direct that they not be construed either to extend or to limit its jurisdiction.[33] A fortiori, those rules cannot be construed to limit *this* Court's jurisdiction. It is ultra vires for CAAF, in determining whether there is good cause for the exercise of its own discretionary jurisdiction, to weigh in the balance – and therefore judge the viability of – the issues a litigant says, under the compulsion of a CAAF rule, that he or she wishes to present *here*.

NIMJ strongly objected to CAAF's 2010 rule change that imposed this requirement.[34] CAAF impermissibly helped itself to a second bite at the apple in terms of barring or keeping open the path to potential review in this Court. What is more, the change made no special provision for cases that had previously been remanded and were still in the appellate pipeline. It took effect on July 1, 2010, which,

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[33] C.A.A.F.R. 4(c).

[34] Letter from Eugene R. Fidell, Pres., NIMJ, to Fed. Dkt. Mgt. Sys. Off. (Mar. 22, 2010), *available at* http://www.wcl.american.edu/nimj/documents/CAAFRuleComments2010.pdf?rd=1. CAAF's order adopting the revised rule made no reference to NIMJ's objections. *In re Change of Rules*, 69 M.J. 159 (C.A.A.F. 2010).

coming more than a month after the Army Court's decision on remand in petitioner's case, meant it was too late for him to seek certiorari with respect to CAAF's 2009 decision. After-the-fact switches are inherently unfair.[35] The 2010 rule change is no exception.[36] The 2010 rule change was thus highly improper, both substantively and procedurally.

It was also unwise, a matter to which this Court should turn a blind eye. The amended rule virtually requires prudent counsel to seek certiorari immediately with respect to any CAAF remand in order to preserve the client's opportunity for review here. The change raised the specter – confirmed by this case – that CAAF could deny review of a case following a remand and thereby attempt to block review here on an issue that was before CAAF prior to remand. There is a place for Supreme Court review of interlocutory appeals in courts-martial, as *Solorio v. United States*[37] demonstrates, but CAAF erred in altering its rules in a way that imposes on counsel a professional obligation to file, thereby adding, perhaps needlessly, to this Court's work. It is bad enough that Congress has given this Court a gate-

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[35] *Hanratty v. F.A.A.*, 780 F.2d 33, 35 (Fed. Cir. 1985).

[36] CAAF never explained why its new requirement for early identification of the issues to be presented in a certiorari petition in order to secure a grant of review below should be limited to cases previously remanded. Consistency suggests that if, contrary to our view, "certworthiness" were a proper factor in CAAF's good-cause decision making under Article 67(a)(3), it should be taken into account in first-time petitions for grant of review as well, these being far more numerous than post-remand petitions.

[37] 549 U.S. 1025 (2006).

keeper function; there is no reason to make matters worse by requiring litigants to overcome that hurdle twice.

The interest in judicial economy is not a valid basis for CAAF's boardinghouse reach in unilaterally expanding its gatekeeping function. In recent Terms, the court has received 650-1000 petitions for grant of review. Many of these cite no errors and are merely pro forma submissions in what are called "merits" cases. The court decides only about one case per month per judge on full opinion.[38] Whatever the precise workload, it does not justify creating an additional, unique obstacle for this one defined class of litigants – a class that should, if anything, be favored in an era in which so many demands are placed on our military personnel – to navigate on the road to this Court. Even if CAAF's settled practice of automatically granting review following remands did (improbably) tax its resources, and even if no time was spent on cases in which neither the accused nor appellate defense counsel even frame an issue, access to this Court is no place (to use Judge Learned Hand's phrase) to ration justice.[39]

There is also the question of the equality of arms between the prosecution and the defense in the mili-

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[38] The statistics may be found on CAAF's website, www.armfor.uscourts.gov, and in the Annual Report of the Code Committee on Military Justice for the Period October 1, 2008 to September 30, 2009, *available at* http://www.armfor.uscourts.gov/Annual.htm.

[39] Learned Hand, Address Before the Legal Aid Society of New York, Feb. 16, 1951, quoted in *Hardy v. United States*, 375 U.S. 277, 293-94 (1964) (Goldberg, J., concurring).

tary system. Under the UCMJ, the accused has the right to have CAAF review his conviction, and therefore to have the Supreme Court review his certiorari petition, only if the punishment extends to the death penalty; in all other cases, CAAF has discretion as to whether to grant review.[40] The government, on the other hand, may appeal to CAAF and to the Supreme Court in any case reviewed by a service court.

Furthermore, CAAF is obligated to hear all cases certified to it by the Judge Advocates General of the respective services, and the Supreme Court has discretionary review of CAAF's decisions in such cases. In the words of then-ABA President H. Thomas Wells, "[h]istorically, certification by the Judge Advocate General ... essentially grants the government a virtual guaranteed right of appeal to the CAAF in any case it chooses, while the accused may only petition for discretionary review."[41]

Given the appellate advantages the UCMJ thus already affords the government, CAAF's 2010 rule change has little to recommend it from the standpoint of providing "Equal Justice Under Law."

CONCLUSION

For the foregoing reasons, the petition is within the Court's jurisdiction. The Court should use the opportunity presented by this case to make clear,

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[40] UCMJ Art. 67, 10 U.S.C. § 867.

[41] *The Equal Justice for Our Military Act of 2009: Hearing on H.R. 569 Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009) (Statement of H. Thomas Wells, Jr., President, the American Bar Association) at 3.

even if only in an order denying certiorari, that (1) a certiorari petition may be filed on all issues presented in a case in which CAAF has granted review or relief, regardless of whether that court identified them when it granted review, and (2) revised Rule 21(b)(5)(G) is unlawful to the extent that it purports to allow CAAF to consider what issues a litigant might include in a certiorari petition in deciding whether there is good cause for CAAF review under Article 67(a)(3).

Respectfully submitted.

EUGENE R. FIDELL
Counsel of Record
127 Wall Street
New Haven, CT 06511
(203) 432-4852

STEPHEN A. SALTZBURG
2000 H Street, N.W.
Washington, DC 20052
(202) 994-7089

MICHELLE M. LINDO MCCLUER
4801 Massachusetts Ave., N.W.
Washington, DC 20016
(202) 274-4322

February 2011